Supreme Court, U.S.
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In The

Supreme Court of the United States

The Federal Democratic Republic of Ethiopia
and The Commercial Bank of Ethiopia,
Petitioners,

v.

Hiwot Nemariam; Belay Redda; Sertzu Gebremeskel; Mebrahtu Gebremedhin; Fekadu Andemeskal; and Mebrat Gebreamlak, widow and personal representative of the estate of Tedros Asfaha,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

W. DEVIER PIERSON
Counsel of Record
KNOX BEMIS
ERICA L. SALMON
PIPER RUDNICK LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

Attorneys for Petitioners

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QUESTIONS PRESENTED

1. Whether international state-to-state tribunals where claims are espoused by the state on behalf of individual claimants are *per se* disqualified as adequate alternative forums under the doctrine of *forum non conveniens* and, if so, whether such disqualification is inconsistent with the broad and flexible doctrine of *forum non conveniens* set forth by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), authorizing trial courts to dismiss suits that should more appropriately be adjudicated in foreign forums.

2. Whether the bar to the application of the doctrine of *forum non conveniens* to such international state-to-state tribunals is inconsistent with the U.S. policy favoring utilization of state-to-state tribunals and settlements to resolve claims arising from disputes between sovereign nations and nationals of other states.

3. Whether the bar to the application of the doctrine of *forum non conveniens* to such international state-to-state tribunals is contrary to the U.S. policy objective of avoiding undue burdens on U.S. courts which result from required adjudication of claims of foreign nationals in which there is no direct U.S. interest and an alternate forum is available.

PARTIES TO THE PROCEEDING BELOW

The appellees before the court of appeals were The Federal Democratic Republic of Ethiopia and The Commercial Bank of Ethiopia. The appellants before the court of appeals were Hiwot Nemariam, Belay Redda, Sertzu Gebremeskel, Mebrahtu Gebremedhin, Fekadu Andemeskal, and Mebrat Gebreamlak, widow and personal representative of the estate of Tedros Asfaha, on behalf of themselves and all others similarly situated as a putative class.

RULE 29.6 STATEMENT

The Commercial Bank of Ethiopia is a public enterprise engaged in commercial banking that is wholly owned by the Government of Ethiopia.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners The Federal Democratic Republic of Ethiopia ("Ethiopia") and The Commercial Bank of Ethiopia ("CBE") respectfully petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit reversing a *forum non conveniens* dismissal of mass claims brought by foreign nationals in favor of the international claims tribunal established to adjudicate such claims.

The court of appeals decision, left undisturbed, would effect a *per se* disqualification of international state-to-state arbitral tribunals as alternative forums to consider such claims where such tribunals require individual claims to be espoused and presented by the state on behalf of individual claimants. Such a rigid restriction on the doctrine of *forum non conveniens* is contrary to the flexible standard set forth by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and by various courts of appeals applying the *Piper* doctrine. This Court has provided no further guidance on the scope of *forum non conveniens* during the twenty-two years since *Piper* and such guidance is now needed to avoid erosion of this important doctrine.

The decision below has important policy consequences. The decision comes at a time when increasing numbers of foreign nationals are bringing actions in U.S. courts under a variety of legal theories. If district courts are not permitted to consider whether a state-to-state tribunal is a preferable forum for the adjudication of foreign disputes, pressures on U.S. courts to hear massive foreign claims will grow even more intense. Such a result is at odds with this Court's

encouragement of the use of international tribunals to resolve foreign disputes and the interest of the United States Government in the conduct of relations with foreign sovereigns.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F.3d 390 and reprinted at App. 1a-9a. The unreported order of the district court granting the Petitioners' motion to dismiss on the basis of *forum non conveniens* is reprinted at App. 10a-22a.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2003, and a timely petition for rehearing and rehearing *en banc* was denied on April 18, 2003. App. 23a. The petition for a writ of certiorari was filed on July 17, 2003. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. The Nature of Respondents' Claims.

Respondents are individuals who claim that they were expelled from Ethiopia and their property taken in violation of international law. They brought this suit as a class action to adjudicate the property claims of the Respondents and a proposed class consisting of up to 75,000 persons of Eritrean descent who, they allege, were deported from Ethiopia and had their property confiscated. The suit was brought against Ethiopia, a foreign sovereign state, and CBE, a state-owned Ethiopian public enterprise involved in commercial banking in Ethiopia. Respondents allege, and Petitioners deny, that the district court has jurisdiction under the international takings clause of the Foreign Sovereign Immunities Act

("FSIA"), 28 U.S.C. § 1605(a)(3), which is reprinted at App. 77a. Respondents assert no other basis of jurisdiction.

This is a wholly foreign dispute. No act complained of took place in the United States. At the time the suit was filed, none of the Respondents was a U.S. citizen or resident, and Respondents concede that most of the plaintiffs and class members currently reside in Eritrea. No wrong is claimed to have been committed by the U.S. government, a U.S. corporation, or a U.S. citizen or resident. None of the property at issue here belonged to, or is alleged to have been transferred to, a U.S. corporation, citizen or resident—or to have ever left Ethiopia. The sole basis for alleged jurisdiction in the U.S. courts is that CBE — for purposes unrelated to the subject matter of this suit — maintains correspondent banking and similar relationships with some U.S. companies.

B. The December 12, 2000 Agreement Terminating the Armed Conflict between Ethiopia and Eritrea and Establishing the Claims Commission.

The suit arises out of the two-year military conflict between Ethiopia and Eritrea commencing in May 1998. During the conflict, there were tens of thousands of deaths, injuries and displacements on both sides of the border. Ethiopia denies, however, Respondents' allegation that Eritreans were expelled from Ethiopia because of their ethnicity or that their property was illegally confiscated.

The United Nations, the Organization of African Unity and individual nations, including particularly the United States, exerted significant diplomatic efforts to end the conflict. The United States supported, and helped bring about, the December 12, 2000 Agreement between Ethiopia and Eritrea (the "Agreement") (reprinted at App. 24a-35a) that provided for the termination of hostilities and the resolution of disputes by reference to the arbitral tribunals

established by the Agreement for this purpose. President Clinton's Special Envoy, Anthony Lake, was instrumental in helping to bring about the Agreement, the United States strongly supported it, and Secretary of State Madeleine Albright signed as a witness to it. App. 34a, 36a-40a; C.A. Joint App. A181-82.

Among its provisions, the Agreement established in Article 5 a neutral Claims Commission whose mandate is to decide claims for loss, damage or injury relating to the conflict and resulting from a violation of international law, including claims by nationals of either Ethiopia or Eritrea against the other government or against entities owned or controlled by the government. Decisions and awards of the Commission are final and binding. Ethiopia and Eritrea agree to honor all decisions and to pay promptly any monetary awards rendered against them. App. 30a-33a.

The Commission was constituted in early 2001, and its members are five highly regarded lawyers and judges with extensive experience in the rules of international law, state responsibility and international claims that are central to the resolution of claims such as Respondents'.[1] C.A. Joint App. A185, A225-26, A228-29, A254, A359-363. The Commission has adopted detailed rules of procedure for the conduct of its work, based on the standing rules of procedure of the Permanent Court of Arbitration. C.A. Joint App. A597-611; *available at* http://www.pca-cpa.org/ENGLISH/RPC/Rules of Procedure.pdf. The Commission has already completed its hearings and handed down its liability awards on the claims of Ethiopia and Eritrea for alleged violations of international humanitarian law in the treatment of their

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[1] The members of the Commission are Professor Hans van Houtte, President, George H. Aldrich, Dean James C.N. Paul, John R. Crook and Lucy Reed.

prisoners of war. *Available at* http:www.pca-cpa.org/ENGLISH/RPC.

C. The Presentation of Respondents' Claims to the Claims Commission.

In accordance with the customary procedure of state-to-state arbitral tribunals such as the Claims Commission, claims of private parties such as the Respondents are prosecuted by the state that espouses the claim on behalf of the private parties. Here, the Agreement expressly provides that, "Claims shall be submitted to the Commission by each of the parties [i.e., Ethiopia and Eritrea] on its own behalf and on behalf of its nationals, including both natural and juridical persons." App. 31a.

On December 12, 2001, Eritrea filed 32 claims with the Claims Commission. One of those claims (Claim No. 15) (reprinted at App. 41a-57a) is "for [p]ersons [e]xpelled from Ethiopia" and seeks monetary compensation for the injuries and losses of such persons, including alleged confiscation of the property of the expellees. App. 41a, 54a. This is the same claim made on behalf of the proposed class in this suit.[2]

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[2] Eritrea consistently stated its intention of bringing these claims before the Commission. In its initial submission, Eritrea informed the Commission that it would submit claims resulting from "[e]xpulsion [and/or] deportation of approximately 80,000 persons from Ethiopia due to their Eritrean ethnic or national origin" — the same group that Plaintiffs seek to represent in this suit. C.A. Joint App. A243-44. In a May 1, 2001 filing, Eritrea repeated that its claims against Ethiopia would include "[c]laims resulting from the practice of deportation/expulsion based on Eritrean citizenship or national origin" and that "Eritrea will request financial compensation or other relief for … the illegal seizure of real and personal property of persons expelled and/or deported from Ethiopia due to their Eritrean ethnic or national origin…." C.A. Joint App. A262-63.

Further, six of Eritrea's claims filed with the Commission were made on behalf of the persons who are the Respondents in this action (Claims Nos. 27-32). Eritrea states in each claim that it "brings this action on behalf of" Hiwot Nemariam (or other named Respondent) and that "it demands arbitration of the claims of Hiwot Nemariam" (or other named Respondent), asserting that "[t]he Claims Commission has jurisdiction over this action pursuant to Article 5, paragraph 1 of the Peace Agreement." App. 58a, 59a. In each claim, Eritrea asks the Commission to award "Eritrea on behalf of Hiwot Nemariam [or other named Respondent], damages in an amount reflecting the fair market value of her [or his] property at the time of its confiscation," compensatory damages, interest and costs. App. 76a. Eritrea notes that "[t]he takings claim presented herein by Eritrea was filed, as part of a class action, in the United States District Court for the District of Columbia on June 12, 2000." App. 59a.[3]

Neither the Claims Commission nor the parties ever took the position that such claims were not for the benefit of the individuals on whose behalf they would be brought or that awards of compensation would not be made to such individuals. Eritrea specifically told the Claims Commission in describing its "[p]lans for distribution of awards to individuals," that "as a general matter, awards should be given directly to claimants. . . . Financial compensation for large amounts of property damage should also be given directly to the individual victims." App. 7a; C.A. Joint App. 560.

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[3] Eritrea's Claims Nos. 27-32 appear at C.A. Joint App. A612-A705. Eritrea's Claim No. 27 on behalf of Hiwot Nemariam is reprinted at App. 58a-76a. Eritrea's Claims Nos. 28-32 follow the same structure and state each of the other parties' claims in essentially the same terms as Claim No. 27.

Ethiopia filed Statements of Defense to these claims on June 15, 2002, agreeing that the Commission has jurisdiction over them and should proceed to adjudicate them. C.A. Joint App. A706-717; A741-808. Eritrea has filed evidence in support of the claims, and the Commission has set them for hearing. After completion of the hearing, the Commission will decide the issue of liability and, if liability is found, will render an award of monetary compensation. C.A. Supp. App. A857.

D. The District Court's Dismissal of the Suit on the Ground of *Forum Non Conveniens* and the Court of Appeals' Reversal of the District Court.

The district court granted Petitioners' motion to dismiss the Respondents' suit in favor of the Claims Commission under the doctrine of *forum non conveniens*. In doing so, the district court began by determining whether an adequate alternative forum exists. Following *Piper Aircraft Co. v. Reyno, supra*, the court correctly recognized that "[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction" and that "[a] foreign forum is not inadequate merely because it has less favorable substantive law, because it employs different adjudicative procedures, or because of general allegations of corruption in the judicial system." The court also recognized that an alternative forum may not be adequate in the "rare situations" where the remedy offered "is clearly unsatisfactory." App. 14a-15a. The district court then applied the law to the facts of this case and concluded that "the Claims Commission is an adequate alternative tribunal that is more convenient and capable of handling the claims in this case." App. 16a-20a.

Without reaching other arguments raised by Respondents, the court of appeals reversed the district

court's decision because the Respondents' claims were being prosecuted by Eritrea:

> We conclude that the Commission's inability to make an award directly to [Respondent] Nemariam, and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim, against claims made by or an award in favor of Ethiopia, render the Commission an inadequate forum . . . .

The court of appeals recognized that the decision was a close one (App. 8a) and that there is nothing in the record to suggest that awards to Respondents will be set off against debts owed by Eritrea to Ethiopia. App. 8a-9a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IMPOSES A *PER SE* DISQUALIFICATION OF STATE-TO-STATE ARBITRAL TRIBUNALS SUCH AS THE CLAIMS COMMISSION FOR PURPOSES OF THE DOCTRINE OF *FORUM NON CONVENIENS* IN CONFLICT WITH THIS COURT'S DECISION IN *PIPER*.

A. This Court in *Piper* Established the Doctrine of *Forum Non Conveniens* as a Broad and Flexible Mechanism to Enable U.S. Courts to Dismiss Claims That Should More Appropriately be Adjudicated in Foreign Forums.

In *Piper*, this Court, building on its analysis in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), applied the doctrine of *forum non conveniens* to judicial forums of other countries. The importance of the doctrine in an ever-shrinking world where foreign claims were increasingly being brought in U.S. courts was apparent. Thus, this Court

recognized the usefulness of the doctrine in dismissing from U.S. courts lawsuits where "[t]he American interest . . . is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here" (*Piper*, 454 U.S. at 261) and in helping to control "the flow of litigation into the United States [that] would increase and further congest already crowded courts" (*id.* at 252).

Nor was the doctrine of *forum non conveniens* to be restricted by the fact that the judicial system of the United States has advantages that make it highly attractive to foreign claimants. In *Piper*, this Court confirmed that the doctrine applies with full force even though the alternate forum may have substantive rules of law less favorable to the plaintiff: "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247. Likewise, the fact that the foreign forum may not offer the same procedural or substantive protections as U.S. courts is not disqualifying. As stated in *Saleem Ahmed v. Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983) (Breyer, J.), the language of *Piper* suggests that the Supreme Court had in mind "a narrow exception" – one that comes into play if the foreign substantive law is "both different and basically unjust." Consequently, in the twenty-two years since *Piper*, lower courts have applied the doctrine of *forum non conveniens* to dismiss actions in favor of a wide array of foreign judicial and quasi-judicial bodies.[4]

This Court stressed in *Piper* that flexibility is an essential element of the doctrine of *forum non conveniens*, pointing

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[4] See discussion of *forum non conveniens* decisions of various courts of appeals in Proposition II below.

out (at 249-50) that its prior decisions[5] had "repeatedly emphasized the need to retain flexibility" in the application of the doctrine. "If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." To preserve flexibility, the Court has avoided "lay[ing] down a rigid rule to govern discretion" in the application of the doctrine. *Id.* As this Court stated:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . ..[6]

454 U.S. at 257.

In conducting the limited review of a trial court's broad discretion to make a *forum non conveniens* dismissal, the threshold issue is whether an alternative foreign forum exists and is able to consider the claim. As this Court put it:

> At the outset of any *forum non conveniens* inquiry, the court must determine whether

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[5] Citing *Gilbert*; *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); and *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549 (1946).

[6] Citing *Gilbert*, 330 U.S., at 511-512; *Koster*, 330 U.S., at 531. The D.C. Circuit has itself in prior decisions recognized the discretion that is to be accorded to the trial court's determination:

> Unlike issues of jurisdiction, determinations of *forum non conveniens* are not pure questions of law; rather they represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another.

Pain v. United Technologies Corp., 637 F.2d 775, 781 (D.C. Cir. 1980)(footnote omitted).

> there exists an alternative forum. Ordinarily this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. *Gilbert*, 330 U.S., at 506-507. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. . .

454 U.S. at 255, n. 22.

In the instant case, there is no question that the alternative forum – the Eritrea Ethiopia Claims Commission – exists, has jurisdiction over Respondents' claims, that Petitioners are "amenable to process" before the Commission, and, indeed, that the Commission is now engaged in the consideration of Respondents' claims. Even so, the Court of Appeals reversed the trial court's dismissal on the sole ground that the Commission did not provide an adequate remedy rather than evaluating the adequacy of the forum based on the circumstances of this case or making an analysis of the appropriateness of the dismissal under the balancing factors established by this Court in *Gilbert*.

B. The Decision Below Disqualifies State-to-State Arbitral Tribunals *Per Se* Where State Espousal Is the Procedure by Which Private Claims Are Adjudicated.

The Claims Commission is the tribunal established by international agreement to adjudicate claims by nationals of either Ethiopia or Eritrea against the other government for injuries arising from alleged violations of international law during the 1998-2000 armed conflict between Ethiopia and

Eritrea. It is the tribunal to which every Ethiopian or Eritrean not a party to this suit must look for redress. Like most other state-to-state tribunals, the Claims Commission operates on the principle of state espousal, i.e., the claims of private parties are espoused by the state and presented by the state on behalf of the individual. Respondents' claims in this lawsuit have been espoused and are being presented by Eritrea at the Claims Commission. C.A. Joint App. A612-705; App. 41a-76a.

The sole reason for the court of appeals' reversal of the trial court's upholding of the Claims Commission as an alternative forum was "the Commission's inability to make an award directly to [Respondent] Nemariam, and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim, against claims made by or an award in favor of Ethiopia." App. 8a. The court of appeals disqualified the Claims Commission despite the unlikelihood that Eritrea will in fact make such a setoff, and, indeed, despite Eritrea's express statement to the Claims Commission that awards should go to the parties sustaining the damages. App. 7a, 9a.

The effect of the ruling below is to impose a *per se* disqualification of such state-to-state arbitral tribunals as alternative forums in a *forum non coveniens* analysis. The factor the court of appeals determined to be fatal to the adequacy of the Claims Commission is a well-established element of the state-to-state arbitration of private claims and is the customary basis upon which state-to-state arbitral tribunals proceed. A state whose national has suffered injury has, as against the state responsible for the injury, the remedies provided by any international agreement applicable between the two states, and the state may bring a claim for violations of international obligations resulting in injury to its nationals or to other persons on whose behalf it is entitled to make a claim under international law. *See Restatement*

(Third) of the Foreign Relations Law of the United States § 713 and § 902 (1987). This state espousal is the mechanism through which the claims of private parties are usually pursued. "Customary international law still maintains the rule that it is the state which has the capacity to present international claims, even though in many cases the claim is substantially that of a private person." Ian Brownlie, *Principles of Public International Law* 596 (5th ed. 1998) (footnote omitted). "Many obligations under international law benefit private persons . . ., but the principal remedies for these obligations are interstate only; international private remedies for violations of international law are still rare." *Restatement, supra.*, Part IX, Intro. Note.[7]

The state's control of the claim is an inherent element of state espousal, even when the state has no intention of exercising it except for the benefit of the private claimant. Nonetheless, recoveries are usually pursued, as by Eritrea, to compensate the individuals for their alleged injuries. Although the tribunals operate on the theory that the state is seeking redress for injury to itself (i.e., through injury to its nationals), the private party is recognized as the real party in interest.

> . . . The [private party] is often consulted or otherwise involved in the claims process. Money damages paid are generally measured, in fact, by the injury to the individual (rather than by the offense to the state), and the state

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[7] Of course, arbitral tribunals can be established in which private parties are permitted to pursue their own claims. For example, the Algiers Accords establishing the Iran-United States Claims Tribunal made such a provision for private claims in excess of $250,000. However, most private claims against foreign governments are prosecuted through state espousal. Brownlie, *Principles of Public International Law, supra*; Restatement, supra, § 902, Cmt. *i*.

> ordinarily pays over to the person the compensation it receives.

Restatement, supra, §902, Cmt. *i.*

State-to-state tribunals operating on the principles of state espousal are an effective and accepted means of resolving claims of private parties against sovereign states. The United States has itself on numerous occasions as part of the settlement of disputes with foreign nations required that the claims of United States citizens to be prosecuted only through government espousal before a tribunal established for the purpose.[8] As recognized by this Court in *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981), "Under [international] agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures." *See American Ins. Assoc. v. Garamendi*, 2003 U.S. LEXIS 4797 at *46 (June 23, 2003) ("Since claims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations' between the countries involved, . . . there is a 'longstanding practice' of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries . . . .") (citations omitted).

From the earliest days of the United States, the President has settled the claims of U.S. nationals against foreign governments by referring the claims to state-to-state arbitral tribunals where they were espoused by the United States. Examples of this long-standing practice include: the

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[8] *See e.g.*, Richard B. Lillich, *et al.*, *International Claims: Their Settlement by Lump-Sum Agreements* 2, 10 (1975); *see also* John B. Moore, *History and Digest of the international arbitrations to which the United States has been a party* 1037 (Hein & Co., 1995); *see also* Richard B. Lillich and Gordon Christenson, *International Claims: Their Preparation and Presentation* 115 (1962).

Mexican-US Claims Commissions of 1839 and 1849 (settlement of claims of U.S. nationals against Mexico);[9] the Ecuadorian-US Claim Commission of 1863 (settlement of the claims of U.S. citizens against Ecuador);[10] the Spanish Claims Commission of 1871 (settlement of claims of U.S. nationals for their losses during the Spanish embargo of Cuba);[11] the US-British Claims Commission of 1871 (settlement of civil war claims);[12] the Chilean-US Claims Commission of 1892 (claims of US nationals against Chile);[13] the US-Germany Mixed Claims Commission (claims of U.S. nationals arising out of World War I);[14] and the US-Mexico Claims Commission of 1923 (claims of U.S. nationals against Mexico).[15]

In *Dames & Moore, supra*, this Court upheld the President's suspension of U.S. nationals' lawsuits against Iran and the requirement that their claims be brought instead before the Iran-United States Claims Tribunal, in accordance with the President's agreement with the government of Iran. Under the agreement, claims of U.S. nationals of less than $250,000 were required to be presented to the Tribunal by the U.S. government. The preponderance of these claims were espoused by the United States and settled by agreement

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[9] John B. Moore, *History and Digest* 1227, 1229, 1253.

[10] *Id.* at 1569.

[11] *Id.* at 1037.

[12] *Id.* at 683, 690

[13] *Id.* at 1475

[14] *See e.g.* Mixed Cl. Com'n, United States-Germany, Administrative Decision No. V 175, 192 (1924); *see also* Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. Chi. L. Rev. 180, 182 (1945-1946)

[15] *See e.g.*, Case of William A. Parker, Gen. Cl. Com'n, United States-Mexico (Convention of 1923), Op. of Commissioners 35, 36 (1927); *see also* Koessler, *Government Espousal* at 183

between the United States and Iran without the participation of the claimants. *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997). Thus, the private claims were required to be brought before the state-to-state tribunal and were resolved there through espousal by the United States.

Left undisturbed, the decision below would now rule off-limits for purposes of *forum non conveniens* all international tribunals operating under the principle of state espousal. Yet such tribunals represent a very important mechanism for the resolution of international disputes and their use has been encouraged. Such a result is at odds with both U.S. policy and the prior decisions of this Court.[16]

C. The Court of Appeals' *Per Se* Disqualification of State-to-State Tribunals is Contrary to *Piper*.

The decision below violates the twin principles of flexibility and trial court discretion that this Court required in *Piper*. The court of appeals decided as a matter of law that the principles of state espousal disqualify a state-to-state tribunal as an adequate forum. The court did not attempt to evaluate the unlikelihood that Eritrea, in light of its on-the-record declarations, would nonetheless refuse to turn over any awards to the individual claimants. The court gave no weight to the trial court's view on this matter (App. 16a-20a). Nor did the court consider whether any condition on the dismissal might have cured the perceived defect in the alternate forum.[17] Instead, the court determined as a matter of law that a tribunal which functions on the basis of state espousal is *per se* inadequate for purposes of the doctrine of

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[16] See Proposition III below.

[17] For example, courts have conditioned *forum non conveniens* dismissals upon reinstitution of the proceeding in the event the alternate forum does not function as expected. *E.g.*, *Ford v. Brown*, 319 F.3d 1302, 1310-1311 (11th Cir. 2003).

forum non conveniens. In creating an inflexible rule of law that such a tribunal cannot be an adequate forum, the court of appeals failed to follow *Piper*.

Moreover, the decision below ignores this Court's test for adequacy of the alternate forum. The court of appeals did state – quoting the applicable language from *Piper* (454 U.S. at 254) – that the "remedy provided by the alternate forum [*i.e.*, the Eritrea Ethiopia Claims Commission] is so clearly inadequate or unsatisfactory that it is no remedy at all." App. 8a. But, this statement is purely conclusory; the only basis given for it is Eritrea's ability to set off an award for Respondents against an award in favor of Ethiopia against Eritrea. However, the possibility that Eritrea – contrary to its own indications to the Claims Commission – might theoretically attempt to withhold part or all of an award in favor of Respondents does not equate the process to "no remedy at all." The court of appeals' conclusion is not supported by any analysis. While the court of appeals quoted the *Piper* standard, it failed to give it effect.

II. THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL APPELLATE COURTS CONCERNING THE ADEQUACY OF ALTERNATIVE FOREIGN FORUMS FOR PURPOSES OF A FORUM NON CONVENIENS ANALYSIS.

In the case below, the District of Columbia Circuit found the Claims Commission to be an inadequate forum for the sole reason that the claims in question must be brought by the state on behalf of the individual claimants. No other circuit has ever disqualified a forum on this or similar grounds. Not only is the decision contrary to *Piper*, it creates a conflict among the circuits with respect to the standard for determining the adequacy of the foreign tribunal for purposes of *forum non conveniens*.

The Second Circuit has found a foreign forum adequate for *forum non conveniens* purposes even though the plaintiffs' government – not the plaintiffs themselves – had control of the claims, including the right to determine how they were prosecuted and whether and on what terms they were settled. *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987). The Second Circuit there affirmed a district court's *forum non conveniens* dismissal of 145 consolidated class actions in favor of an Indian court, despite the fact that India barred the plaintiffs from bringing individual claims and granted the government of India the exclusive right to commence and to settle the action as representative of the plaintiffs and their putative classes. Indeed, the court held that "it might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal." 809 F.2d at 202. *See also In re Lloyd's American Trust Fund Litigation*, 954 F. Supp. 656, 673 (S.D.N.Y. 1997) (holding that an alternative forum that recognized "representative actions" was adequate).

Similarly, in *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002), *cert denied*, 123 S. Ct. 1928 (2003), the Fifth Circuit held the Mexican forum to be an adequate alternative for purposes of *forum non conveniens* even though Mexican law capped plaintiff's potential recovery at $2,500, an amount so low as to make it impractical for plaintiff to bring an action there. In so doing, the Fifth Circuit conceded that dismissal on the ground of *forum non conveniens* would determine the outcome in the defendant's favor. 301 F.3d at 382-383. The finding in the case below that the Claims Commission is inadequate as an alternative forum because of the theoretical possibility that Respondents might not receive some portion of their award cannot be reconciled with the Fifth Circuit conclusion in *Gonzalez* that the foreign forum was adequate even though plaintiff would recover nothing there.

The Third, Fifth, Sixth and Tenth Circuits, mindful that this Court ruled that to be disqualified a forum must be "clearly inadequate," as where it does not have jurisdiction over the defendant or where it does not permit litigation of the subject matter of the dispute, have upheld *forum non conveniens* dismissal even when the alternative forum does not provide the same procedural guarantees as a U.S. court. *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 607 (10th Cir. 1998) (procedural differences do not halt a *forum non conveniens* dismissal in the absence of a "complete denial of due process"); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1165 (5th Cir. 1987) ("A foreign forum is adequate . . . even though [the parties] may not enjoy the same benefits they might receive in an American court."); *Scottish Air Int'l v. British Caledonian Group PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996) ("the overwhelming consensus of the decisions is that 'the unavailability of beneficial litigation procedures similar to those in federal district court does not render an alternative forum inadequate'"). Similarly, the fact that a forum does not permit class actions does not make it inadequate. *Aguinda v. Texaco, Inc.* 303 F.3d 470, 478 (2d Cir. 2002).

Moreover, several circuits have dismissed claims in favor of non-judicial forums that afford few if any of the procedural safeguards of federal court litigation. *See e.g., Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001) (dismissing tort claim in favor of no-fault administrative remedy and explaining that "[t]he district court was not required to ask whether Plaintiffs could bring this lawsuit in New Zealand, but rather, whether New Zealand offers a remedy for their losses"); *Jeha v. Arabian American Oil Co.*, 751 F. Supp. 122, 125 (S.D. Tex. 1990), *aff'd without opinion*, 936 F.2d 569 (5th Cir. 1991) (dismissing medical malpractice claim in favor of quasi-judicial commission in Saudi Arabia).

Even decisions of courts of appeals in which alternative forums have been held to be inadequate do not support the case below. In those cases, the plaintiffs could not obtain *any* relief in the alternative forum because that forum could not hear the subject matter of the plaintiffs' claims under any circumstances (*e.g.*, *El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 678-79 (D.C. Cir. 1996) (specific Jordanian laws, decrees and statutes constituted "an absolute prohibition" to any claims against the defendants based on the subject matter of the plaintiff's action)), because physical danger barred plaintiff from the alternate forum (*e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 250-51 (2d Cir. 1995) (ongoing civil war in Bosnia and Serbia)), or because inordinate delays in the alternate court system effectively prevented relief (*Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995) (twenty-five year delays in cases before the Indian courts)).

This Court has not dealt with the substantive requirements of the *forum non conveniens* doctrine in the twenty-two years since it decided *Piper*. The District of Columbia Circuit is now at odds with every other circuit in its approach to determining the adequacy of foreign forums in a *forum non conveniens* setting. The ruling below is especially significant because the court of appeals' decision has disqualified *per se* an entire category of alternate forums. If other circuits were to follow this decision, the utility of the doctrine of *forum non conveniens* would be severely undermined.

III. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE POLICIES OF THE UNITED STATES REGARDING THE ADJUDICATION OF FOREIGN CLAIMS.

A. The Disqualification of State-to-State Tribunals Is in Conflict with the Decisions of This Court and Lower Courts Upholding the Use of Such Procedures to Adjudicate International Disputes.

The ruling below cannot be reconciled with the decisions of this Court and other federal courts upholding the use of state-to-state tribunals and the government espousal procedure to resolve the claims of private parties arising out of conflicts between nations. State-to-state arbitration is a valuable tool frequently utilized by the United States and other members of the international community as a method of settling international disputes involving claims of private parties. In *Dames & Moore v. Regan*, *supra*, this Court upheld the use of such a tribunal, the Iran-United States Claims Tribunal, and the dismissal of pending claims in U.S. courts in favor of that tribunal. Indeed, in *Dames & Moore* this Court rejected the argument that the Foreign Sovereign Immunities Act ("FSIA") preserved the plaintiff's right to maintain its court action. The Court ruled, "The FSIA was . . . designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as *prohibiting* the President from settling claims of United States nationals against foreign governments." 453 U.S. at 685 (emphasis in original). Thus, this Court held that a United States national can be required to forego its FSIA lawsuit in favor of a state-to-state tribunal. It is inconsistent with this Court's ruling to hold, as the court of appeals did, that in a proceeding in which virtually every element is foreign to the United States,

the state-to-state tribunal established to hear such claims is unavailable for purposes of *forum non conveniens*.

Subsequent to this Court's decision in *Dames & Moore*, the Court of Appeals for the Federal Circuit upheld the espousal procedure when it considered the challenge to the Iran-United States Claims Tribunal by private parties whose claims were below $250,000 and were espoused and settled by the United States. *Abrahim-Youri v. United States, supra*. As the court put it:

> [Plaintiffs'] property rights . . . were extinguished when the Government espoused and settled their claims. After the espousal by the United States, the choses in action were not simply regulated in some manner, but were terminated; plaintiffs no longer had claims against Iran, but instead a claim against the fund to be allocated by the [Foreign Claims Settlement] Commission.

139 F.3d at 1465-66.

The United States government negotiated with Iran a lump sum in settlement of the claims of these private parties and certain claims of the United States. The government first allocated a portion of the settlement to its own claims, and the remainder was allocated among the private claimants, resulting in their being paid less than full value. The court ruled that a compensible taking had not been established. "[T]he fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States." 139 F.3d at 1468.

Thus, U.S. nationals can be lawfully required to submit their claims to a state-to-state arbitral tribunal and to settlement through government espousal. In contrast, foreign plaintiffs in an entirely foreign dispute, the court of appeals

held here, cannot be required to submit their claims to the Eritrea Ethiopia Claims Commission solely because it employs the espousal procedure. The decision below is in conflict with *Abrahim-Youri* because disqualification of the Claims Commission on the basis of its use of espousal cannot be reconciled with the acceptance of espousal as applied to U.S. nationals.

B. The Ruling of the Court of Appeals Is Contrary to the Policy of This Court and the Government of the United States Favoring the Resolution of International Disputes Through Arbitral Tribunals.

The decision of the court below gratuitously undermines the authority and credibility of the Claims Commission, characterizing its efforts as "so clearly inadequate or unsatisfactory that it is no remedy at all." App. 8a. Yet, except for Respondents, every private party with injuries arising out of the conflict between Eritrea and Ethiopia must look to the Claims Commission for redress. The Claims Commission functions under procedures that are well established and accepted in international law. The United States was a leading proponent of the December 12, 2000 Agreement between Ethiopia and Eritrea and creation of the Claims Commission was a key element of that Agreement. App. 39a.

The ruling of the court of appeals is inconsistent with the United States' own practice. As this Court recounted in *Dames & Moore*, 453 U.S. at 680:

> . . . international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, Foreign Affairs and the Constitution 262 (1972). Consistent with that principle, the United States has repeatedly exercised its

> sovereign authority to settle the claims of its nationals against foreign countries. . . . Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. . . . [I]t is . . . undisputed that the "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard to their interests, as distinguished from those of the nation as a whole." Henkin, *supra*, at 262-263. Accord Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).

The decision below inevitably calls into question the viability of state-to-state tribunals for the resolution of such disputes. The inadequacy the court of appeals found in the claims procedure for purposes of *forum non conveniens* is inconsistent with its use for the resolution of the claims of private United States nationals against foreign governments.

The ruling also casts doubt upon the validity of the practice of settling private claims against foreign governments by means of lump sum settlements negotiated by and payable to the government of the private party on account of the private party's claim. These settlements are negotiated on the principles of espousal and are subject to the same perceived defect – control by the state over the prosecution of the claim and the payment of the award – that the court of appeals held to disqualify the Claims Commission. There have been more than 200 settlement agreements negotiated since the end of World War II which awarded compensation to a state on behalf of its nationals, from which the state through its own mechanism awarded

compensation to individual claimants.[18] Those agreements were negotiated, for example, between West Germany and Poland, Austria and Yugoslavia, Britain and the Czech Republic, Italy and Czechoslovakia, Canada and Romania, Switzerland and Morocco, Britain and Egypt and France and Zaire.[19] The United States has espoused private claims and negotiated settlement agreements with numerous foreign countries. Indeed, the settlement of the less-than-$250,000 claims pending before the Iran-United States Claim Tribunal is an example of this practice. The United States has a permanent standing body, the Foreign Claims Settlement Commission, whose function is to distribute funds received from foreign governments among the various claimants after considering each claim and ruling on its validity. 22 U.S.C. §1622 *et seq.* (2003).

Moreover, the ruling of the court of appeals in effect invites the courts of other states to open their doors to claims by U.S. nationals that the U.S. government has sought to resolve through either an international claims commission or a lump sum settlement agreement. Longstanding U.S. government policy, supported by the Supreme Court, favors the resolution of conflicts between our country and other countries through the use of such dispute settlement mechanisms. *E.g.*, *Dames & Moore*, 453 U.S. at 679. Yet those mechanisms would be ineffective if the U.S. government were unable to assure foreign states that it was capable diplomatically of resolving the claims of U.S. nationals. The United States could not make such assurances if U.S. nationals were capable of submitting their claims

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[18] See Richard B. Lillich, *et al.*, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995*, 21 (1999) (listing no fewer than 20 lump-sum settlement agreements from 1975-1995); see also Lillich, et al., *International Claims: Their Settlement by Lump Sum Agreements, supra*, 106.

[19] See Lillich, *International Claims: 1975-1995*, 87-88.

before foreign courts, notwithstanding the fact that the U.S. government had espoused the claims. While the United States cannot control the manner in which foreign courts address claims filed before them by U.S. nationals, assertions by the United States to foreign courts that they should dismiss claims of U.S. nationals in favor of dispute settlement mechanisms created at the diplomatic level would be particularly weak if the decision of the court of appeals in this case is allowed to stand.

This Court has made clear that it favors the resolution of disputes by arbitral tribunals, even when those tribunals do not possess the full attributes of the courts. In *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court upheld the parties' agreement to refer a commercial dispute to arbitration even though it involved issues under the United States antitrust laws. Recently, in *American Ins. Assoc. v. Garamendi*, *supra*, this Court reaffirmed the power and appropriateness of the U.S. government resolving by means of an international commission the claims of U.S. residents relating to the Holocaust era. The Court pointed out that resolving claims through an *ad hoc* commission rather than litigation in the U.S. courts can serve to resolve competing concerns, including the U.S. interest in amicable relationships with foreign countries and the interests of persons in fair and prompt resolution of their claims so as to bring some measure of justice. The decision of the court of appeals disqualifying the arbitral tribunal because its procedures do not provide the same level of assurance as judgments of United States courts is contrary to the policies articulated in *Mitsubishi* and *American Ins. Assoc.*

C. The Ruling Undermines a Necessary Device for Limiting the Litigation of Purely Foreign Disputes in United States Courts.

As this Court noted in *Piper*, one well recognized purpose of the doctrine of *forum non conveniens* is to limit or deny access to U.S. courts for disputes whose predominately foreign characteristics make it inappropriate for the U.S. courts to adjudicate them. 454 U.S. at 251-52, 261. Similarly, in a subsequent decision, when addressing the danger that "a foreign state could consent to suit based on activities wholly unrelated to the United States" so as to invoke FSIA jurisdiction (under 28 U.S.C. § 1605(a)(1)), this Court noted that, "The [FSIA] does not appear to affect the traditional doctrine of *forum non conveniens*," indicating confidence that the doctrine would properly function to exclude disputes that were wholly foreign. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490, n. 15 (1983).

The lower courts have also recognized this purpose of the doctrine. The Second Circuit, in upholding the application of the provisions of the FSIA to a case with only a slight nexus to the United States, stated:

> We are not concerned that United States courts will become the courts of choice for local disputes between foreign plaintiffs and foreign sovereign defendants and thus be reduced to "international courts of claims." The traditional doctrine of forum non conveniens . . . is still applicable in cases arising under the Foreign Sovereign Immunities Act.

Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 394 (2d Cir. 1985)(citations omitted).

Thus, the doctrine of *forum non conveniens* serves as an important filter to screen out foreign disputes that are

asserted to fall within the letter of the FSIA but that have no relationship of substance to the United States and do not belong in U.S. courts. The present dispute is such a case. This suit has been brought against Ethiopia, a sovereign state, for alleged actions taken in a governmental capacity in Ethiopia during a military conflict between Ethiopia and Eritrea. The claims in question are mass claims of up to 75,000 persons of Eritrean descent for alleged loss of property located in Ethiopia. Nothing involved in the dispute – plaintiffs, defendants, property location, property ownership, alleged wrongful acts – has a U.S. connection.[20]

Forcing this matter into U.S. courts is especially unconscionable when the Eritrea Ethiopia Claims Commission – an international tribunal created with the active support of the United States for this very purpose – has unquestioned jurisdiction over the claims and is currently proceeding to consider them. This is the tribunal that all other private parties – Eritrean and Ethiopians – must look to for the resolution of claims resulting from their conflict. For the benefit of these Respondents alone, U.S. courts would be called upon to adjudicate the claims of a putative class action of up to 75,000 Eritreans and to pass on the propriety of actions of a foreign sovereign. Such a result would severely undermine the utility of the doctrine of *forum non conveniens* in cases involving foreign disputes.

This case is similar in some respects to recent actions brought under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), where foreign plaintiffs have sought to prosecute in U. S. courts claims with little or no connection with the

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[20] The only basis for jurisdiction is Respondent's allegation, denied by Petitioners, that correspondent banking relationships of CBE – an Ethiopian bank with no U.S. presence – with U.S. banks is a "commercial activity" within in the meaning of 28 U.S.C. § 1605(a)(3), and that the U.S. courts therefore have no discretion to decline jurisdiction.

United States. The United States, through the Attorney General, has recently opposed this use of the ATS, noting that:

> . . . the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatever with the United States.[21]

These same considerations apply with equal force in this case. The dispute here is one that is completely foreign to the United States, and there is no valid reason why it should be adjudicated in the United States courts.

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[21] Brief for the United States of America as *amicus curiae* filed with the Ninth Circuit Court of Appeals on May 8, 2003, at 2, *Doe v. Unocal*, 248 F. 3d 915 (9th Cir. 2001), *reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003) (Nos. 00-56603, 00-56628).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the decision of the court of appeals.

Respectfully submitted,

W. DeVier Pierson
Counsel of Record
Knox Bemis
Erica L. Salmon
Piper Rudnick LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

Attorneys for Petitioners

July 17, 2003

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 18, 2002 Decided January 24, 2003

No. 01-7142

HIWOT NEMARIAM, ET AL.,

APPELLANTS

v.

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA AND

THE COMMERCIAL BANK OF ETHIOPIA,

APPELLEES

Appeal from the United States District Court

for the District of Columbia

(No. 00cv01392)

Donald Francis Donovan argued the cause for appellants. With him on the briefs was *Katherine Birmingham Wilmore.*

W. DeVier Pierson argued the cause for appellees. With him on the brief was *Knox Bemis.*

Before: GINSBURG, *Chief Judge,* HENDERSON, *Circuit Judge,* and WILLIAMS, *Senior Circuit Judge.*

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, *Chief Judge*: Hiwot Nemariam and others appeal the district court's dismissal of their suit against Ethiopia seeking recovery for property damage they suffered during the border war between Ethiopia and Eritrea. The district court determined that the Ethiopia/Eritrea Claims Commission was a more appropriate forum for the plaintiffs' claims, and dismissed their case on the ground of *forum non conveniens*. We reverse the judgment of the district court because the Commission does not offer the plaintiffs an adequate remedy.

I. Background

In May 1998 a long-standing border dispute between Eritrea and Ethiopia erupted into a general armed conflict. Nemariam, who was living in Ethiopia at that time, claims that shortly thereafter the government of Ethiopia began expelling persons who, like her, were Ethiopian citizens of Eritrean descent, and confiscating any property they left behind. To take but one example, Nemariam claims that her account at the Commercial Bank of Ethiopia (CBE), an agency or instrumentality of the government, was effectively expropriated when she was expelled from the country because Ethiopian banking regulations permit withdrawal of funds only when an account holder presents a passbook in person at the bank.

In December 2000 Ethiopia and Eritrea signed a Peace Agreement, which formally ended the conflict. It also created the Ethiopia/Eritrea Claims Commission:

> The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned and controlled by the

> other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

Art. 5, ¶ 1. The decisions of the Commission are made by a panel of five arbitrators, two chosen by each country and one chosen by the other four. Art. 5, ¶ 2. The Commission, which is based in the Hague, "may hold hearings or conduct investigations in the territory of either party, or at such other location as it deems expedient." Art. 5, ¶ 3.

Ethiopia and Eritrea are the only two parties permitted to appear before the Commission, but they may bring claims "on behalf of [their] nationals, including both natural and juridical persons." Art. 5, ¶ 8. Eritrea or Ethiopia may also "file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals." Art. 5, ¶ 9. The Agreement vested in the Commission exclusive jurisdiction over all claims arising from the conflict "[e]xcept for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this Agreement." Art. 5, ¶ 8. Therefore, any claim not filed in another forum prior to December 12, 2000, the effective date of the Agreement, could be filed only with the Commission. Paragraph 16 of Article 5 allows Eritrea and Ethiopia to "agree at any time to settle outstanding claims, individually or by categories, through direct negotiation or by reference to another mutually agreed settlement mechanism."

In June 2000 Nemariam filed a two-count complaint against Ethiopia and the CBE in the District Court for the District of Columbia, asserting that Ethiopia's actions amounted to a taking of her property in violation of international law. Nemariam invoked the jurisdiction of the

court under the international takings provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3).

Ethiopia moved to dismiss the case on the ground that the district court was a *forum non conveniens,* pursuant to the four-step test we outlined in *Pain v. United Technologies Corp.*:

> As a prerequisite, the court must establish whether an adequate forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of *private* interest, weighing in the balance a strong presumption against disturbing plaintiff's initial forum choice. If the trial judge finds this balance of private interests to be in equipoise or near equipoise, he must then determine whether or not factors of public interest tip the balance in favor of a trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.

637 F.2d 775, 784-85 (D.C. Cir. 1980) (emphases in original); *but see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (overruling the third part of the *Pain* test by stating that dismissal is appropriate if the plaintiffs "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems").

The district court granted the motion. The court first determined that the Commission was an adequate alternative forum; it had five distinguished arbitrators, all well versed in international law, and it was authorized to hold hearings and to resolve claims. Although Nemariam could not bring a claim herself, the district court found that Eritrea could bring a claim on her behalf, that the Commission had jurisdiction to hear that claim, and that Eritrea "has no incentive not to espouse as

many meritorious claims as possible before the Commission."

The district court rejected Nemariam's argument that the remedy provided by the Commission was inadequate because Eritrea and Ethiopia might negotiate a set-off of each other's claims, thereby denying her an award even if she had a meritorious claim. The district court stated, "nothing in the record ... suggest[s] that the Commission contemplates a 'set off' remedy;" and "even if compensation under the Claims Commission proves different than it might be in a U.S. court, this is not a case where the 'remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.'" (quoting *Piper Aircraft Co. v. Reyno,* 454 U.S. 234, 254 (1981)). Next, the court found the private and public interest factors heavily favored the Commission. Finally, the court dismissed the case without prejudice and provided that "the case is subject to reinstatement for good cause shown if named plaintiffs' claims are not submitted to the Claims Commission by the government of Eritrea despite affirmative, timely request therefore [sic] by plaintiffs."

In the time since the district court dismissed the case, the Commission has implemented procedures and begun the adjudication of claims submitted to it. Eritrea's submissions cover the claims made by Nemariam and the other plaintiffs in this suit. And the Commission has ordered the filing of evidence for those claims and has scheduled a 13-day hearing to begin on June 16, 2003.

II. Analysis

On appeal Nemariam first argues that the Commission is an inadequate forum because, even if her claim is valid, she has no personal right to a remedy from the Commission. Second, Nemariam argues that the Commission is an inadequate forum because she may not file a claim before the Commission and she has no control over any claim Eritrea

may file on her behalf. Third, Nemariam contends that the district court misapplied the private and public interest factors. Finally, Nemariam argues that Ethiopia waived its right to seek dismissal on the basis of *forum non conveniens* when it agreed that "the Commission shall be the sole forum for adjudicating claims" "except for ... claims filed in another forum prior to the effective date of this [Peace] Agreement." Art. 5, ¶ 8.

We review the district court's order dismissing the case for a "clear abuse of discretion." *Piper,* 454 U.S. at 257. Because we agree with Nemariam's first point, we do not reach her other arguments.

Because Nemariam lacks a personal right to a remedy from the Commission, she argues that any "remedy provided by the [Commission to Eritrea with respect to her claim] is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper,* 454 U.S. at 254. We think that the Commission's inability to make an award directly to Nemariam, and the possibility that Eritrea could set off Nemariam's claims or even an award in her favor against claims made by or an award in favor of Ethiopia, render the Commission an inadequate forum.

First, it appears, as Nemariam says, the Commission cannot award any relief directly to her. Nothing in the Peace Agreement authorizes the Commission to make an award to anybody other than Eritrea or Ethiopia, the parties before the Commission. Although it is true that Article 5, ¶ 9 allows Eritrea to bring a claim "on behalf of persons [like the plaintiffs] of ... Eritrean origin who may not be its nationals," Eritrea would presumably control the disposition of any resulting award.

Second, it appears Eritrea may set off Nemariam's claim or an award in her favor against any claims or awards that Ethiopia may have against Eritrea. Under international law, Eritrea is the master of its own claim before the Commission and may keep or barter any remedy awarded by the

Commission. *See Restatement (Third)* of *the Foreign Relations Law of the United States* § 902, cmt. I (1987) ("The state may determine what international remedies to pursue, may abandon the claim, or settle it"). It is irrelevant whether the Commission currently contemplates that any awards to the respective governments will be set off by them against each other. What matters is that Eritrea and Ethiopia have that option. In fact, Eritrea and Ethiopia may bypass the Commission entirely in resolving their claims. *See* Agreement, Art. 5, ¶ 16 ("The parties may agree at any time to settle outstanding claims, individually or by categories, through direct negotiation or by reference to another mutually agreed settlement mechanism"). Unless Ethiopia can negate these possibilities, we think they render the Commission an inadequate alternative to the district court.

Ethiopia's response is two-fold. First, it points out that Eritrea has stated before the Commission that it intends to give directly to the claimant any award made to it for a taking of private property. Ethiopia does not deny that the Commission cannot require Eritrea to pass through to Nemariam any award it may receive with respect to the claim it has filed on her behalf. Rather, Ethiopia claims that Eritrea intends voluntarily to distribute awards to individual claimants.

Eritrea has indeed indicated in a memorandum to the Commission that "Eritrea believes that, as a general matter, awards should be given directly to claimants.... Financial compensation for large amounts of property damage should also be given directly to the individual victims." By invoking those statements, however, Ethiopia is asking Nemariam and this court to rely upon the goodwill of Eritrea, not upon the power of the Commission to enforce its judgments. In this vein, we note that Eritrea has also recognized the possibility – albeit in circumstances apparently different from those alleged in the present case – that an individual with a meritorious claim might not receive any compensation. In the same memorandum, Eritrea informed the Commission that "the

practical difficulties of individual distribution might outweigh the desirability of individualized compensation." Therefore, Ethiopia is unable to substantiate its claim that Nemariam will receive a remedy if Eritrea succeeds in prosecuting her claim before the Commission.

Second, Ethiopia argues that we should follow *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (2002), in which the Fifth Circuit affirmed the dismissal of a case on the ground of *forum non conveniens* even though it was unlikely the plaintiff would receive in the alternative forum – namely, a Mexican court – a remedy adequate by United States standards. In *Gonzalez* the law of the alternative forum did provide a remedy, but it capped the potential recovery at a modest $2500, and the plaintiff alleged he would not bring the suit in Mexico because the costs of doing so would outweigh the potential recovery. In this case, however, Ethiopia cannot assure Nemariam of recovering any award at all, even if the Commission upholds her claim in full. While a more limited recovery than is available in the plaintiffs forum of choice does not automatically make the alternative forum inadequate, we fail to see how an alternative forum in which the plaintiff can recover nothing for a valid claim may also be deemed adequate. In other words, it would be peculiar indeed to dismiss Nemariam's claim in the United States District Court – a forum in which, assuming the court has jurisdiction, she is certain to be awarded full relief if she wins on the merits of her claim – in favor of a forum in which she has no certainty of getting any relief for a meritorious claim.

We conclude that the Commission's inability to make an award directly to Nemariam, and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim, against claims made by or an award in favor of Ethiopia, render the Commission an inadequate forum; the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper*, 454 U.S. at 254. In so saying, we recognize that the decision is a close one, particularly in the light of our limited standard of

review and the district court's observation, with which we agree, that there is nothing in the record to suggest the plaintiffs' awards will be set off against debts owed by Eritrea to Ethiopia. Neither, however, is there any legal barrier to such a set off.

III. Conclusion

Because we conclude that the district court abused its discretion in determining that the Commission was an adequate alternative forum we do not reach Nemariam's other arguments. For the foregoing reasons, the judgment of the district court dismissing this case on the ground of *forum non conveniens* is

Reversed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HIWOT NEMARIAM, et al.	)	
Plaintiffs,	)	
v.	)	
	)	Civil Action No. 00-1392
	)	(TPJ)
	)	[Stamped]
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiffs bring this action pursuant to the Foreign Sovereign Immunities Act ("FSIA") against the Federal Democratic Republic of Ethiopia and the Commercial Bank of Ethiopia ("CBE") on behalf of themselves and all other persons of Eritrean origin who were allegedly expelled from Ethiopia on or about June 12, 1998 and whose properties were expropriated by the defendants. Plaintiffs assert jurisdiction under the international takings exception to the FSIA, 28 U.S.C. § 1605(a)(3). The matter is presently before the Court on the motion of defendants to dismiss the complaint.

I.

The events giving rise to the case all occurred in the country of Ethiopia and resulted from the long-standing tension between Ethiopia and its neighbor Eritrea. In 1993, following thirty years of conflict, Eritrea seceded peacefully from Ethiopia through a referendum on

independence supervised by the United Nations, and in May, 1993, Eritrea was admitted as a member of the U.N. Although Eritrea's secession was peaceful, the border between the two countries was never clearly demarcated. In May, 1998, a dispute over frontier land erupted into a violent border clash that escalated into a general armed conflict. The events of the instant case occurred shortly thereafter, and the parties' contentions are sharply in controversy.

According to the plaintiffs, starting in June, 1998, Ethiopia began a campaign of identifying, detaining and expelling persons of Eritrean descent, including the plaintiffs. On June 12. 1998, the Ethiopian government issued an order freezing the bank accounts of persons of Eritrean descent. Ethiopia's Immigration Office assembled lists of "Eritreans" based on birth in Eritrea, membership in Eritrean organizations, or voting / eligibility to vote in the 1993 Eritrean referendum on independence. Anyone appearing on those lists was classified as an "Eritrean" and could no longer claim Ethiopian citizenship. The named plaintiffs were stripped of their Ethiopian citizenship, expelled from Ethiopia, and their property was expropriated solely on the ground that they are of Eritrean descent or nationality. Both the U.S. and the U.N. condemned the mass expulsion of "Eritreans."

Prior to June 12, 1998, the named plaintiffs allege that they held bank accounts with the Commercial Bank of Ethiopia. Plaintiffs assert that CBE has prevented plaintiffs from accessing their bank accounts as a result of the Ethiopian government's order of June 12, 1998. Because Ethiopian banking regulations permit withdrawal of funds only when a passbook is presented in person by the account holder, plaintiffs contend that all personal accounts were de facto expropriated as a result of plaintiffs' expulsion from Ethiopia.[1] According to

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[1] Plaintiffs say that defendant CBE is an agent or instrumentality of Ethiopia. It was established in 1964 by an official proclamation of the Ethiopian government, acquired a commercial banking monopoly by 1974,

plaintiffs, all "Eritreans" who had bank accounts have been deprived of access to them. The Ethiopian government also allegedly seized other property and subsequently auctioned it off for the benefit of the CBE and the government, without compensation to plaintiffs. The above actions were only taken against "Eritreans," not any other ethnic or political group.

On June 18, 2000, Ethiopia and Eritrea signed a cease fire agreement, and on December 12, 2000, they signed a peace agreement formally ending the conflict and setting up a claims commission (the "Claims Commission") to hear claims for loss, damage, or injury arising out of the conflict.[2]

II.

Defendants filed a motion to dismiss on November 17, 2000. Defendants dispute many of the factual allegations of the complaint. Defendants allege that during the hostilities both Ethiopia and Eritrea took steps to identify persons within their borders who were considered dangerous because of their political activity and / or support for the other country's war efforts. Defendants contend that people of Eritrean origin may and do continue

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and currently accounts for approximately 90% of all commercial banking activities in Ethiopia.

[2] In their two-count complaint filed on June 27, 2000, the named plaintiffs, four Eritreans expelled from Ethiopia in 1998, assert that these actions amount to a taking in violation of international law and a taking in conjunction with mass expulsions. Plaintiffs filed their First Amended Complaint on June 8, 2001 adding two plaintiffs-one named and one listed as "John A." On that same date, plaintiffs also filed a motion for John A. to proceed anonymously.

Plaintiffs seek to represent a purported class of 70,000 that would consist of persons whose bank accounts and other property in Ethiopia have been expropriated in violation of international law and (1) who are of Eritrean origin, descent, or nationality, or (2) whom Ethiopia otherwise treated as Eritrean.

to live peacefully in Ethiopia and that those who were expelled were spying for Eritrea or otherwise supporting Eritrean aggression. Defendants contend that the Ethiopian government has never issued an order freezing the bank accounts of all persons of Eritrean origin nor has CBE taken any action to freeze accounts belonging to Eritreans. Defendants submit an affidavit from the Legal Counselor for the CBE concerning the status of various CBE bank accounts of the named plaintiffs, noting that they are not frozen and can be accessed by the holders or their personal representatives. *See* Defs' Ex. A, ¶ 26.

Irrespective of the truth or falsity of the plaintiffs' allegations, however, defendants argue that the case should be dismissed because: (1) the expropriation exception to the FSIA does not apply; (2) defendants lack sufficient minimum contacts with the forum for personal jurisdiction; (3) the act of state doctrine requires dismissal of the complaint; (4) the complaint should be dismissed for forum non conveniens; and (5) the Court should abstain from entertaining this action because of the ongoing peace process and negotiations. The abstention argument is now moot because the peace negotiations have been completed.

Plaintiffs filed their opposition on February 16, 2001, contending that subject matter jurisdiction is proper under the FSIA, that personal jurisdiction is not necessary, that the doctrine of forum non conveniens is not apposite, and that the act of state doctrine does not apply.

III.

The Court observes that jurisdictional facts in this case are in dispute; thus a decision as to whether the Court has subject matter jurisdiction is premature.[3] The D.C.

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[3] 'Similarly, a decision as to personal jurisdiction; which under the FSIA is linked to subject matter jurisdiction, is also premature. See 28 U.S.C. §1330.

Circuit has held that a trial court should "consider other potentially dispositive jurisdictional defenses before allowing FSIA discovery." In re Papandreou, 139 F.3d 247, 254 (D.C. Cir. 1998). Forum non conveniens is a potentially dispositive jurisdictional defense; the act of state doctrine is not. See id.

As the Supreme Court has noted, "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court." Piper Aircraft Co. v. Reyno 454 U.S. 235, 257 (1981). A district court may dismiss a case on the ground of forum non conveniens

> when an alternative forum has jurisdiction to hear a case, and when trial in the chosen forum would "establish ... oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."

Id. at 241 (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)) (omissions in original). Courts generally balance the interests of plaintiffs, defendants, and the court in an effort to weigh the relative convenience of the chosen forum against the convenience of an alternative forum that also has jurisdiction over the parties and the subject matter of the suit.

In deciding a forum non conveniens motion, courts in the D.C. Circuit apply a four-part test. See Pain v. United Technologies Corp., 637 F.2d 775, 784-85 (D.C. Cir. 1980). First, the court determines whether an adequate alternative forum exists. "Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." Piper, 454 U.S. at 254 n.22 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947)). "A foreign forum is not inadequate merely because it has less favorable

substantive law, because it employs different adjudicative procedures, or because of general allegations of corruption in the judicial system." El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 678 (D.C. Cir. 1996) (internal citations omitted). In rare situations, however, when "the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative." Piper, 454 U.S. at 254 n.22. The defendant "bears the burden of proving that there is an adequate alternative forum." El-Fadl, 75 F.3d at 677.

Second, if the court concludes that an adequate alternative forum exists, it weighs a number of "private interests factors" to determine whether the relative convenience of the alternative forum overrides the general presumption in favor of plaintiff's choice of forum, a presumption that is diminished in a case involving foreign plaintiffs. See Piper, 454 U.S. at 256 ("Because the central purposes of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.") The private interest factors of the litigants include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508.

Third, if the private interests are in "equipoise or near equipoise," the court considers several "public interest factors" to determine whether the public interest would be served by allowing the case to go forward in the alternative forum. These public interest factors include:

> the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper, 454 U.S. at 241 n.6 (quoting Gilbert, 330 U.S. at 509).

Fourth, if the court concludes that the alternative forum is adequate and the private and public interests weigh in favor of the alternative forum, the court must ensure that the plaintiffs would be able to "reinstate their suit in the alternative forum without undue inconvenience or prejudice." Pain, 637 F.2d at 785.

Defendants argue that the case should be dismissed on forum non conveniens grounds in favor of the international Claims Commission established by Ethiopia and Eritrea to decide the economic claims of individuals in both countries resulting from the dislocations and fighting between 1998 and 2000. It is clear to the Court that the Claims Commission is an adequate alternative tribunal that is more convenient and capable of handling the claims in this case.

The Claims Commission was established under Article 5 of the December 12, 2000 Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of Eritrea (the "Peace Agreement"). Article 5 provides that:

> [t]he mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party

> against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

Art. 5, ¶ 1. The Commission consists of five arbitrators: two were selected by each country and the fifth was selected by the other four. The five chosen arbitrators all are extremely distinguished international law specialists with experience in human rights law and international claims commissions. See Yimer Decl., Ex. 7. The Commission is located in the Hague and is empowered to employ its own professional staff and adopt its rules of procedure based on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States. See Art. 5, ¶ 5-7. The Commission is also empowered to hold hearings and investigations in the territory of Ethiopia or Eritrea or other locations. See Art. 5, ¶ 5.

Claims shall be submitted to the Commission by each country on its own behalf and on behalf of its nationals, and "[i]n appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals." Art. 5, ¶ 9. The claims of the plaintiffs in this case can all be brought by Eritrea: all of the plaintiffs are "persons of Ethiopian or Eritrean origin," and three of the named plaintiffs state that they are now citizens of Eritrea. All claims must be filed no later than December 12, 2001, which allows plaintiffs

sufficient time to present their claims to Eritrea for filing. See Art. 5, ¶ 8.

Plaintiffs contend that Claims Commission expressly contemplates allowing the instant claims to proceed before this Court, and it should therefore do so. The Agreement provides that:

> [e]xcept for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this Agreement, the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this article, and any such claims which could have been and were not submitted by that deadline shall be extinguished, in accordance with international law.

Art. 5, ¶ 8 (emphasis supplied). Although the claims in this case were "filed in another forum [i.e., this District Court] prior to the effective date of this Agreement," the Agreement does not preclude plaintiffs' claims from being re-filed with the Commission. The Agreement simply admits of concurrent jurisdiction-it does not render this Court an exclusive forum for them.

The Commission is authorized to adopt methods of efficient case management and mass claims processing that it deems appropriate. See Art. 5, ¶ 10. The Commission has already commenced its work, holding an initial meeting with both sides on March 27, 2001, asking for submission of the parties' positions on various issues, and setting future dates. See Yimer Decl., Ex. 10. Eritrea has submitted a letter to the Commission indicating its intent to prepare tens of thousands of claims addressing, among other issues, the deportation and denationalization of Ethiopian citizens due to their Eritrean origins, and the seizure and misappropriation of civilian and government-owned property. See Yimer Decl. Ex. 11;

Brilmayer Decl. ¶ 21. These claims would encompass the claims at issue in this case. Eritrea has also stated its position that "Ethiopian citizens of Eritrean ethnic or national origin who were illegally denationalized, deported, and expelled from Ethiopia must be ensured the right to return to their homes in order to claim their property. Documentation which was systematically seized upon the injured parties' unlawful imprisonment and expulsion must be returned to them immediately in order to facilitate processing of their claims." See Yimer Decl. Ex. 11.

The plaintiffs contest the availability and object to the adequacy of the Claims Commission on the grounds that, as a global settlement of these issues, individuals may not have the opportunity to fully assert their claims; the claims are asserted by the respective governments, so it is at Eritrea's discretion whether to espouse any particular individual's claim.[4] The Court observes that each government has no incentive not to espouse as many meritorious claims as possible before the Commission. Plaintiffs also argue that Eritrea will likely prioritize human rights claims, and that "claims of purely financial injuries, including the taking of property, will be given less emphasis." See Brilmayer Decl. at ¶33. However, Eritrea has "stated its intention to pursue the claims of individuals expelled and denationalized by Ethiopia, as well as claims of taking of property, requesting financial compensation and other relief." See id. at ¶21. Plaintiffs also express concern that any settlement might be in the form of a set-off between the two countries, but they point to nothing in the record to suggest that the Commission contemplates a "set off" remedy.

The government of Eritrea is represented before the Claims Commission by a member of a well-respected

[4] An analogous concern about individual representation, however, could be raised with respect to the Rule 23 class representation plaintiffs propose for themselves before this Court.

United States law firm on boundary issues and by a Yale Law School professor, Lea Brilmayer, and her deputy on claims procedures. Arguments that counsel is inadequate appear to be misplaced. Plaintiffs argue that Eritrea (and its counsel) lack sufficient resources to adequately present the claims and in particular lack the resources of plaintiffs' counsel to pursue the claims at issue in the instant case. This Court is unaware of anything in the Peace Agreement or Claims Commission procedures that would prevent counsel in the instant case from assisting Professor Brilmayer and her team in working on claims to present to the Claims Commission.

Defendants have demonstrated that the Claims Commission is an adequate alternative forum. Even if compensation under the Claims Commission proves different than it might be in a U.S. court, this is not a case where the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." Piper, 454 U.S. at 254.

Once defendants have established that there is an adequate alternative forum, this Court examines whether the private and public interest factors set forth by the Supreme Court in Gilbert favor resolution of these claims in this Court or in the alternative forum. The factors weigh decisively in favor of the Claims Commission.

Private interest factors to be considered include access to sources of proof, availability of compulsory process, cost of obtaining witnesses, possibility of viewing the premises, and other miscellaneous problems with the chosen forum. See Gilbert, 330 U.S. at 508. All of the events at issue in this case occurred in Ethiopia, and the vast majority of plaintiffs, witnesses, and evidence are located in Eritrea and / or Ethiopia. None of the named plaintiffs is a U.S. citizen, and only one is a lawful permanent resident. The potential witnesses located abroad are not likely to be subject to

compulsory process from this Court, and the cost of bringing witnesses and evidence to this country and arranging for translators would be substantial. The Claims Commission, on the other hand, can hold hearings in Eritrea and / or Ethiopia, and will already be making appropriate logistical arrangements for taking evidence situated within, and for coping with language differences.

Public interest factors include administrative difficulties for the courts, local interest in having local controversies decided at home, and familiarity with the substantive law governing the case. See Gilbert, 330 U.S. at 508-509. As noted above, the location of witnesses and evidence and the need for translators would pose serious administrative problems for this Court, and would entail significant expense in trying the case here. The District of Columbia as an entity has no interest in the case-none of the parties is a citizen of the U.S. or resident of this district, and the events at issue in this case are in no way "local" to either D.C. or the United States.[5] The law to be applied in this case is substantive international law, a source of law that the U.S. District Courts do not apply on a regular basis. In contrast, the Claims Commission is specifically charged with applying the relevant rules of international law, see Art. 5, ¶ 13, and all of the commissioners have extensive experience in the field. Moreover, they will already be examining the specific problems at issue in this case and possess experience in handling mass claims.

For the foregoing reasons, the Court concludes that this case should be dismissed on forum non conveniens grounds in favor of the Claims Commission in the Hague, and it is, this 2nd day of August, 2001,

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[5] At this stage, whether some potential class members are U.S. citizens or D.C. residents is irrelevant. None of the named plaintiffs is either.

ORDERED, that defendants' motion to dismiss the complaint is granted; and it is

FURTHER ORDERED, that the case is dismissed without prejudice in favor of the Claims Commission in the Hague as an alternative forum; and it is

FURTHER ORDERED, that the case is subject to reinstatement for good cause shown if named plaintiffs' claims are not submitted to the Claims Commission by the government of Eritrea despite affirmative, timely request therefore by plaintiffs; and it is

FURTHER ORDERED, that plaintiffs' motion for John A. to proceed anonymously is denied as moot.

/s / Thomas Penfield Jackson

U.S. District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7142 **September Term, 2002**
00cv01392

Hiwot Nemariam, et al.,
Appellants

Filed On: April 18, 2003
[Stamped]

v.

The Federal Democratic Republic of Ethiopia and The Commercial Bank of Ethiopia,
Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellees' petition for rehearing en banc, the opposition thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:
/s/ Michael C. McGrail
Deputy Clerk

AGREEMENT

BETWEEN

THE GOVERNMENT OF THE FEDERAL

DEMOCRATIC REPUBLIC OF ETHIOPIA

AND

THE GOVERNMENT OF THE

STATE OF ERITREA

The Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (the "parties"),

Reaffirming their acceptance of the Organization of African Unity ("OAU") Framework Agreement and the Modalities for its Implementation, which have been endorsed by the 35th ordinary session of the Assembly of Heads of State and Government, held in Algiers, Algeria, from 12 to 14 July 1999,

Recommitting themselves to the Agreement on Cessation of Hostilities, signed in Algiers on 18 June 2000,

Welcoming the commitment of the OAU and United Nations, through their endorsement of the Framework Agreement and Agreement on Cessation of Hostilities, to work closely with the international community to mobilize resources for the resettlement of displaced persons, as well as rehabilitation and peace building in both countries,

Have agreed as follows:

Article 1

1. The parties shall permanently terminate military hostilities between themselves. Each party shall refrain from the threat or use of force against the other.

2. The parties shall respect and fully implement the provisions of the Agreement on Cessation of Hostilities.

Article 2

1. In fulfilling their obligations under international humanitarian law, including the 1949 Geneva Conventions relative to the protection of victims of armed conflict ("1949 Geneva Conventions"), and in cooperation with the International Committee of the Red Cross, the parties shall without delay release and repatriate all prisoners of war.

2. In fulfilling their obligations under international humanitarian law, including the 1949 Geneva Conventions, and in cooperation with the International Committee of the Red Cross, the parties shall without delay, release and repatriate or return to their last place of residence all other persons detained as a result of the armed conflict.

3. The parties shall afford humane treatment to each other's nationals and persons of each other's national origin within their respective territories.

Article 3

1. In order to determine the origins of the conflict, an investigation will be carried out on the incidents of 6 May 1998 and on any other incident prior to that date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997.

2. The investigation will be carried out by an independent, impartial body appointed by the Secretary General of the OAU, in consultation with the Secretary General of the United Nations and the two parties.

3. The independent body will endeavor to submit its report to the Secretary General of the OAU in a timely fashion.

4. The parties shall cooperate fully with the independent body.

5. The Secretary General of the OAU will communicate a copy of the report to each of the two parties, which shall consider it in accordance with the letter and spirit of the Framework Agreement and the Modalities.

Article 4

1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the

parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.

3. The Commission shall be located in The Hague.

4. Each party shall, by written notice to the United Nations Secretary General, appoint two commissioners within 45 days from the effective date of this Agreement, neither of whom shall he nationals or permanent residents of the party making the appointment. In the event that a party fails to name one or both of its party-appointed commissioners within the specified time, the Secretary General of the United Nations shall make the appointment.

5. The president of the Commission shall be selected by the party-appointed commissioners or, failing their agreement within 30 days of the date of appointment of the latest party-appointed commissioner, by the Secretary General of the United Nations after consultation with the parties. The president shall be neither a national nor permanent resident of either party.

6. In the event of the death or resignation of a commissioner in the course of the proceedings, a substitute commissioner shall be appointed or chosen pursuant to the procedure set forth in this article that was applicable to the appointment or choice of the commissioner being replaced.

7. The UN Cartographer shall serve as Secretary to the Commission and undertake such tasks as assigned to him by the Commission, making use of the technical expertise of

the UN Cartographic Unit. The Commission may also engage the services of additional experts as it deems necessary.

8. Within 45 days after the effective date of this Agreement, each party shall provide to the Secretary its claims and evidence relevant to the mandate of the Commission. These shall be provided to the other party by the Secretary.

9. After reviewing such evidence and within 45 days of its receipt, but not earlier than 15 days after the Commission is constituted, the Secretary shall transmit to the Commission and the parties any materials relevant to the mandate of the Commission as well as his findings identifying those portions of the border as to which there appears to be no dispute between the parties. The Secretary shall also transmit to the Commission all the claims and evidence presented by the parties.

10. With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures.

11. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States. Filing deadlines for the parties' written submissions shall be simultaneous rather than consecutive. All decisions of the Commission shall be made by a majority of the commissioners.

12. The Commission shall commence its work not more than 15 days after it is constituted and shall endeavor to make its decision concerning delimitation of the border

within six months of its first meeting. The Commission shall take this objective into consideration when establishing its schedule. At its discretion, the Commission may extend this deadline.

13. Upon reaching a final decision regarding delimitation of the borders, the Commission shall transmit its decision to the parties and Secretaries General of the OAU and the United Nations for publication, and the Commission shall arrange for expeditious demarcation.

14. The parties agree to cooperate with the Commission, its experts and other staff in all respects during the process of delimitation and demarcation, including the facilitation of access to territory they control. Each party shall accord to the Commission and its employees the same privileges and immunities as are accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations.

15. The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party.

16. Recognizing that the results of the delimitation and demarcation process are not yet known, the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory.

17. The expenses of the Commission shall be borne equally by the two parties. To defray its expenses, the Commission may accept donations from the United Nations Trust Fund established under paragraph 8 of Security Council Resolution 1177 of 26 June 1998.

Article 5

1. Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.

2. The Commission shall consist of five arbitrators. Each party shall, by written notice to the United Nations Secretary General, appoint two members within 45 days from the effective date of this Agreement, neither of whom shall be nationals or permanent residents of the party making the appointment. In the event that a party fails to name one or both of its party-appointed arbitrators within the specified time, the Secretary General of the United Nations shall make the appointment.

3. The president of the Commission shall be selected by the party appointed arbitrators or, failing their agreement within 30 days of the date of appointment of the latest party-appointed arbitrator, by the Secretary General of the United

Nations after consultation with the parties. The president shall be neither a national nor permanent resident of either party.

4. In the event of the death or resignation of a member of the Commission in the course of the proceedings, a substitute member shall be appointed or chosen pursuant to the procedure set forth in this article that was applicable to the appointment or choice of the arbitrator being replaced.

5. The Commission shall be located in The Hague. At its discretion it may hold hearings and conduct investigations in the territory of either party, or at such other location as it deems expedient.

6. The Commission shall be empowered to employ such professional, administrative and clerical staff as it deems necessary to accomplish its work, including establishment of a Registry. The Commission may also retain consultants and experts to facilitate the expeditious completion of its work.

7. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States. All decisions of the Commission shall be made by a majority of the commissioners.

8. Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons. All claims submitted to the Commission shall be filed no later than one year from the effective date of this Agreement. Except for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this Agreement, the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this article, and any such claims which could

have been and were not submitted by that deadline shall be extinguished, in accordance with international law.

9. In appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals.

10. In order to facilitate the expeditious resolution of these disputes, the Commission shall be authorized to adopt such methods of efficient case management and mass claims processing as it deems appropriate, such as expedited procedures for processing claims and checking claims on a sample basis for further verification only if circumstances warrant.

11. Upon application of either of the parties, the Commission may decide to consider specific claims, or categories of claims, on a priority basis.

12. The Commission shall commence its work not more than 15 days after it is constituted and shall endeavor to complete its work within three years of the date when the period or filing claims closes pursuant to paragraph 8.

13. In considering claims, the Commission shall apply relevant rules of international law. The Commission shall not have the power to make decisions *ex aequo et bono.*

14. Interest, costs and fees may be awarded.

15. The expenses of the Commission shall be borne equally by the parties. Each party shall pay any invoice from the Commission within 30 days of its receipt.

16. The parties may agree at any time to settle outstanding claims, individually or by categories, through direct negotiation or by reference to another mutually agreed settlement mechanism.

17. Decisions and awards of the Commission shall be final and binding. The parties agree to honor all decisions and to pay-any monetary awards rendered against them promptly.

18. Each party shall accord to members of the Commission and its employees the privileges and immunities that are accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations.

Article 6

1. This Agreement shall enter into force on the date of signature.

2. The parties authorize the Secretary General of the OAU to register this Agreement with the Secretariat of the United Nations in accordance with Article 102(1) of the Charter of the United Nations.

DONE at Algiers on the twelfth day of December, 2000, in duplicate, in the English language.

FOR THE GOVERNMENT OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA	FOR THE GOVERNMENT OF THE STATE OF ERITREA
/s/ Meles Zenawi	/s/Isaias Afwerki
Meles ZENAWI Prime Minister	Isaias AFWERKI President

WITNESSED BY:

For the People's Democratic Republic of Algeria
Abdelaziz BOUTEFLIKA, President of the Republic

/s/ Abdelaziz Bouteflika

For the United States of America
Mme Madeleine K. ALBRIGHT, Secretary of State

/s/ Mme. Madeleine K. Albright

For the United Nations
M. Kofi ANNAN, Secretary General

/s/ M. Kofi Annan

For the Organization of African Unity
M. Salim Ahmed Salim, Secretary General
/s/ M. Salim Ahmed Salim

For the European Union
M. Rino SERRI, Special Representative of the Presidency.

/s/ M. Rino Serri

Call to the International Community

On December 12, 2000, the international community has witnessed a particularly important event: the signature of a peace agreement between Ethiopia and Eritrea which puts an end to a deadly conflict that has divided, for the last two years, these two brotherly and neighboring countries.

This conflict, now ended, has caused thousands of casualties, the destruction of infrastructure and assets, and dramatic consequences for hundreds of thousands of displaced people.

This destructive war, with all of its tragic effects, has come to an end, thanks to the will, the wisdom and the spirit of compromise demonstrated by the leaders of these two brotherly countries which have managed, with the resolute and persevering support of the O.A.U. and its partners, to transcend their differences and to step forward resolutely on an irreversible drive toward peace.

In the face of this positive development and the hopes generated by the confirmation of this will for peace, the international community should consolidate, with the necessary support and assistance, this historical achievement of peace, so as to create conditions for the rapid and comprehensive implementation of this agreement and to strengthen the two countries efforts toward recovery, reconstruction and development.

In this regard, the international community is urged, at the bilateral or the multilateral level, to demonstrate its effective solidarity toward these two brotherly countries, which have just proved to Africa that only recourse to a peaceful settlement process can end conflict on the African continent.

Transcript: Albright Witnesses Ethiopia-Eritrea Peace Pact Signing
Says progress, peace can be attained in Africa

"Progress is possible ... peace can be attained" in sub-Saharan Africa, Secretary of State Madeleine Albright said December 12 as she witnessed the signing of a peace agreement between Ethiopia and Eritrea.

Speaking in Algiers, the site of the signing ceremony, Albright said: "For years, a chorus of voices has alleged that Africa's problems are hopeless. Here today ... let the message go forth that those voices are wrong."

The United States, she said, is "proud -- not only to have assisted in achieving this agreement, but to have done so in the right way: by supporting the OAU [Organization of African Unity].

"On behalf of President Clinton, I want to extend special thanks to [Algerian] President [Abdelaziz] Bouteflika for his leadership, and to the government of Algeria for its collaboration with the United States in this endeavor.

"It is indicative of President Bouteflika's commitment to peace," she said, "that he continued to provide outstanding leadership well beyond his tenure as OAU chairman. And we are all indebted to him for guiding the process through to today's ceremony."

At the heart of the agreement, Albright said, is the fact that "the two combatants agreed to put their trust in an impartial process that can resolve disputes between them. We must hope that others on this continent will follow the same path of trust and accommodation."

Of course, she added, "the peace we celebrate today is not just a success for international diplomacy," but marks "a success for the two governments and leaders whose wisdom finally brought an end to the conflict. Above all, it is a victory for the people of both countries. And a promise that those who lived through the ravages of war may once again reap the benefits of peace.

"Now it falls to us in the international community to help them do so," she said. "The presence of U.N. Secretary-General Annan is symbolic of this commitment. And the rapid deployment of the U.N. Mission in Ethiopia and Eritrea already gives it practical meaning."

Following is the State Department transcript of Albright's remarks:

(begin transcript)

U.S. DEPARTMENT OF STATE Office of the Spokesman (Algiers, Algeria)

For Immediate Release

Remarks as delivered

Remarks by Secretary of State Madeleine K. Albright Ethiopia-Eritrea Peace Agreement Ceremony Algiers, Algeria

December 12, 2000

President Bouteflika, Prime Minister Meles, President Isaias, Presidents Obasanjo and Eyadema, Secretary-General Annan, Secretary-General Salim, excellencies from the diplomatic corps, guests and friends.

I am grateful to President Bouteflika for his leadership and vision, as well as the invitation to take part in this important ceremony. The Government of Algeria and the Organization of African Unity deserve great praise and recognition for the

crucial role they have played in facilitating this peace agreement.

President Clinton asked me to represent him today, and to convey his congratulations to Prime Minister Meles, President Isaias and President Bouteflika. The President has spoken himself with great sadness about this conflict. And now, in equal measure, he has asked me to tell you of his relief and thankfulness that the peoples of Ethiopia and Eritrea can begin again. To enjoy what he often describes as "the quiet miracle of a normal life."

This is the last stop of what may be my last trip to Africa as Secretary of State. For years, a chorus of voices has alleged that Africa's problems are hopeless. Here today, in this room, and with these signatures, let the message go forth that those voices are wrong; that progress is possible, that peace can be attained.

That is why the United States is proud - not only to have assisted in achieving this agreement -- but to have done so in the right way: by supporting the OAU. On behalf of President Clinton, I want to extend special thanks to President Bouteflika for his leadership, and to the Government of Algeria for its collaboration with the United States in this endeavor.

It is indicative of President Bouteflika's commitment to peace, that he continued to provide outstanding leadership well beyond his tenure as OAU Chairman. And we are all indebted to him for guiding the process through to today's ceremony.

Of course, I would not be here on behalf of the President, if it were not for the critical role of our own team.

First and foremost, I want to thank my friend, the former National Security Advisor, and President Clinton's Special Envoy, Anthony Lake-- for his tireless efforts over more than two years. He has logged countless miles on his peace-

making visits to the region, and to Algeria. His tenacity and generosity in this effort is another example of his selfless commitment to public service.

I also want to especially thank Assistant Secretary of State Susan Rice, National Security Council Senior Director Gayle Smith, and Special Advisor John Prendergast. These individuals, and several others, were a force for peace -- devoting relentless energy, over a great many days and many long nights, to the task of negotiating a settlement.

In the end, an agreement was reached. And the essence of that agreement is what brings us here today. At its heart, the two combatants agreed to put their trust in an impartial process that can resolve disputes between them. We must hope that others on this continent will follow the same path of trust and accommodation.

And, of course, the peace we celebrate today is not just a success for international diplomacy. It is a success for the two governments and leaders whose wisdom finally brought an end to the conflict. Above all, it is a victory for the people of both countries. And a promise that those who lived through the ravages of war, may once again reap the benefits of peace:

Now it falls to us in the international community to help them do so. The presence of U.N. Secretary-General Annan is symbolic of this commitment. And the rapid deployment of the U.N. Mission in Ethiopia and Eritrea already gives it practical meaning. I want to thank the Secretary-General for his personal interest and support of UNMEE.

And say the United States is committed to doing its part -- from supporting landmine clearance to providing development assistance. We will reinvigorate our relations with both nations as a matter of both humanitarian obligation and national interest.

And the friends of Ethiopia and Eritrea will pray that the bitterness of the last two years can be put to rest. That these two governments and peoples can surmount an even greater challenge. They must now find in their hearts the spirit of reconciliation that will allow them to restore their ties, and shape a common future of peace and progress.

From my office in Washington, I see every day a great monument to the spirit of reconciliation. Within the memorial to Abraham Lincoln are inscribed the words of a great American president.

The words call on a people to rebuild from the ashes of war -- to act "with malice toward none; with charity for all ... to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan -- to do all which may achieve and cherish a just and lasting peace."

To the peoples of Ethiopia and Eritrea, I say the hope and promise of this day is yours. May your memories of pain and suffering fade far into the past. And may today's peace last long into your children's future.

(end transcript)

(Distributed by the Office of International Information Programs, U.S. Department of State. Web site: http://usinfo.state.gov)

State of Eritrea
Statement of Claim for Persons Expelled from Ethiopia

A. Names and Addresses of Parties

State of Eritrea
c/o The Ministry of Foreign Affairs Asmara, Eritrea
Correspondence to be addressed to:
Office of the Legal Advisor to the Office of the President
Asmara, Eritrea
Telephone: (291) (1) 20-12-60
Fax: (291) (1) 12-21-42 E-mail: legaladv@eol.com.er

B. Description of Claimant

1. This claim is made by the State of Eritrea on behalf of itself, by virtue of injuries and losses suffered by the State of Eritrea and its nationals (and individuals of Eritrean origin as designated in Article 5, Paragraph 9) resulting from the internment, expulsion, and confiscation of property of Eritrean nationals and Ethiopians of Eritrean extraction and for the denationalization of Ethiopians of Eritrean origin/extraction.

C. Statement of Facts

2. In May 1998, Ethiopia began a policy of mass expulsion of Ethiopians of Eritrean extraction and Eritrean nationals.[1] Since that time more than 110,000 individuals have been expelled from Ethiopia. The majority of these individuals are Ethiopian citizens of Eritrean extraction; the remainder are Eritrean citizens who were legally present in Ethiopia. Most deportations have taken place after periods of

[1] The events surrounding the expulsion of Ethiopians of Eritrean extraction and Eritrean nationals are largely the same and so will be submitted jointly in this Statement of Claim. Ethiopians of Eritrean extraction have an additional claim for denationalization; when the events deal only with Ethiopians of Eritrean extraction, this will be explicitly stated.

imprisonment under deplorable conditions, followed by long, arduous journeys by bus or on foot. In almost every instance the Ethiopians have illegally confiscated the property of those expelled.

Denationalization

3. Ethiopia has made no differentiation between Eritrean nationals and Ethiopian citizens of Eritrean extraction in its policy of expulsion. It has denied the citizenship of individuals of Eritrean extraction based solely on their ethnicity. Ethiopia has gone so far as to mark the Ethiopian passports of some of the individuals it has expelled "deported." There can be little doubt that these people have been denationalized.

Historical Background of the Situation

4. Although the historical and political connections between Ethiopia and Eritrea are long-standing and complex, the legal status of the expelled persons can be appreciated from a summary overview of contemporary history of the region.

5. At the end of World War II, Italy relinquished its colonial territories in Africa, of which Eritrea was one. Pursuant to a UN recommendation, Eritrea was federated with Ethiopia under the sovereignty of the Ethiopian crown. In the early 1960s, however, Ethiopia dissolved the federation and annexed Eritrea as a province, touching off a war of independence that lasted for thirty years. While the war effort originated with Eritreans fighting for independence, they were joined in later years by other Ethiopian groups who sought instead as their primary objective the overthrow of the existing Ethiopian government.

6. These joint efforts were successful in 1991, at which point the Marxist-Leninist regime of Mengistu Haile Mariam was driven from power. A UN-monitored referendum on

Eritrean independence was scheduled for 1993 with the approval of the new Ethiopian government; and it resulted in an overwhelming vote for independence. Since 1993, Eritrea has been an independent state.

7. Because of the many strong cultural, social; linguistic, and religious connections between the two countries - and because for forty years they were part of the same internationally recognized state - there has been constant movement and relocation from Eritrea to Ethiopia proper, and vice versa. Intermarriages are common. Although almost all of the current deportees are "Eritrean" in the sense that their families originated in the part of Ethiopia that achieved independence in 1993, each of these persons was legally a citizen of Ethiopia prior to 1991 for the simple reason that prior to the 1993 referendum no internationally recognized state of Eritrea existed. Furthermore, under Article 6 of the Ethiopian constitution, any person with one or both Ethiopian parents has Ethiopian citizenship by birth.

8. At no point during the independence process was it suggested that persons whose families traced their roots to the Eritrean part of Ethiopia would automatically lose their legal status as Ethiopian citizens simply by virtue of the fact that Eritrea was becoming an independent state. Neither was it ever suggested that the price of participating in the independence referendum was an automatic loss of Ethiopian citizenship. To suggest that voting in the referendum would lead to loss of citizenship would have meant that if the vote had gone against independence, each of the persons voting would have been rendered stateless.

9. The majority of Ethiopians of Eritrean extraction possessed full legal documentation of their Ethiopian citizenship before their arrest, although in some cases their documents were destroyed or confiscated by the authorities during the deportation process. Their documentation included items such as Ethiopian passports, Ethiopian

identity cards, which expressly stated the bearer's citizenship as "Ethiopian," and Ethiopian government business licenses which listed Ethiopian citizenship.

Expulsion

10. The newly denationalized individuals were afforded no process through which to contest their internment, denationalization, or deportation. The treatment of Eritrean nationals was identical. Expellees were forcibly transported to the border directly from detention without having the opportunity to contact families, legal assistance, or international organizations.

11. Most of those deported pose no conceivable threat to security. Included in the numbers of those deported are large numbers of children, infants, and the very elderly.

12. Ethiopian officials often took individuals into custody in the middle of the night. Families were often separated. At times parents who were deported were not allowed to take their children, leaving minor children without caretakers or income. In other instances heads of household were expelled, leaving entire families without income.

13. Almost no one was given an explanation or any form of legal or administrative process. The people who were given explanations were told that they were being expelled for being Eritrean, even while their Ethiopian identity documents were being cancelled in front of them.

14. In many instances, those being expelled spent long days on buses without food, water, or sanitary facilities. They were then most often left in the no-man's-land between the Ethiopian and Eritrean front lines. They were forced to walk long distances, often in intense heat, into the front lines of the Eritreans. The Eritrean authorities were rarely informed that civilians would be crossing the lines. In at least

one instance, the Ethiopian troops fired over the heads of the civilians as they walked toward the Eritrean front lines. By happy circumstance, an Eritrean soldier heard a child crying, realized what was happening, and prevented the Eritrean soldiers from returning fire.

Detention

15. With the exception of some rural expellees who were marched directly across the border, the expellees were arrested by Ethiopian security personnel and jailed in Ethiopian prisons, police stations, and detention camps prior to their expulsions.

16. Conditions in detention in Ethiopia were dismal. Ethiopian authorities did not provide adequate food or water. In most instances individuals were forced to buy or beg for food and water from the local population or other prisoners. They had little or no access to sanitary facilities. Civilian prisoners were not provided with medical attention.

17. Individuals were at times held in metal shipping containers for weeks prior to expulsion. At other times, individuals were beaten in an attempt to make them forswear their Ethiopian citizenship.

Illegal Confiscation of Property

18. Ethiopia has illegally confiscated the property of the persons it has forcibly expelled. All types of property have been seized. Some examples of confiscated property include houses, bank accounts, farms, commercial trucks, cars, pensions, businesses, commercial real estate, and equipment. Ethiopia also confiscated personal documents such as identity documents, business records, tax records, diplomas, and marriage certificates.

19. Even in instances where the property was not outright confiscated, the summarily expelled persons were forced to abandon property. Lucky expellees were allowed to take a

suitcase full of clothes. Most were not allowed to take anything.

20. Ethiopia makes no secret of these confiscations; in November 1999, for example, the Ethiopian government publicly announced that it would auction 85.7 million Birr worth of property belonging to victims of its policy of forcible expulsion.

21. Ethiopia's arbitrary expulsion of individuals has devastated entire families. Many individuals who were expelled find themselves in an unfamiliar country, where many do not even speak the language. Many have been forced to leave their spouses and/or children behind. All have lost their citizenship, their homes, and their property.

D. Violations of International Law

22. Ethiopia's policy of ethnic expulsion is itself is a violation of international law. The manner in which Ethiopia executes this illegal policy - with denationalization, lack of due process, physical and mental abuse, separation of families, illegal detention under appalling conditions, and mass confiscation of property - violates all norms of international humanitarian law.

Illegal Expulsion

23. Ethiopia does not deny that it has engaged in widespread expulsions of ethnic Eritreans. On 9 July 1998, Prime Minister Meles Zenawi defended this policy on Radio Ethiopia by stating: "If we say, `Go, because we do not like the colour of your eyes,' they have to leave." Its strategy for defending its policy of forcible expulsion of ethnic Eritreans has been to deny that the ethnic Eritreans that it is expelling are Ethiopian citizens. Given that Ethiopia has signed human rights instruments explicitly prohibiting ethnically motivated expulsions even of aliens, this defense is beside the point. Moreover, Ethiopia cannot reface its forcible expulsions of its ethnically Eritrean

citizens by depriving them of their citizenship. This denationalization of its citizens is itself an independent violation of international law.

Expulsion of Eritrean Nationals

24. Ethiopia has engaged in the illegal mass expulsion of Eritrean nationals. The overwhelming number of those expelled were Ethiopian citizens; however, the masses of those expelled also included Eritrean nationals. International human rights law applicable to Ethiopia prohibits mass expulsion regardless of the nationality of the victims.

25. The Organization of African Unity's African Charter on Human and Peoples' Rights (to which Ethiopia is a party) provides in Article 12(5) that:

> The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial ethnic or religious groups.

26. The International Covenant on Civil and Political Rights (which Ethiopia ratified in 1993) provides in Article 13 that an alien may be expelled "only in pursuance of a decision reached in accordance with law." Official commentary to this article explicitly states that "in accordance with law" means pursuant to an individualized decision of deportability:

> Article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.[2]

27. The collective expulsion of aliens has also been prohibited in other regional human rights instruments, such

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[2] UN Doc. A/41/40, Annex VI, paras. *9-10 (1986). See also* Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary *226 (1993).*

as the European Convention on Human Rights and the American Convention on Human Rights.

28. Article 35 of Geneva Convention No. IV[3] states:

> All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so....

The official commentary explains this language as follows:

> The words "who may desire to leave the territory" show quite clearly that the departure of the protected persons concerned will take place only if they wish to leave .... [T]he idea is implicit in the text actually adopted, although it is expressed somewhat differently. The point is an important one, for may foreign civilians do not which to leave a country where they have lived for many years and to which they are attached.[4]

29. Thus, even if Ethiopia were correct that it can avoid the prohibitions on expulsions of one's own nationals by first denationalizing its citizens of Eritrean origin or extraction, its activities would nonetheless be illegal mass expulsion.

Prohibitions on Expulsion of Nationals

30. Ethiopia has engaged in the illegal mass expulsion of Ethiopian nationals of Eritrean extraction. The prohibitions on denationalization or expulsion of a State's own citizens are even more firmly entrenched than those prohibiting mass expulsion of aliens. International human rights treaties expressly prohibit the expulsion of nationals.

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[3] Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949, entered into force 21 October 1950) (hereafter "Geneva Convention No. IV").

[4] Commentary Article 35 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *as available at* <hgp:www.icrc.org/ihl.nsf>.

31. Article 13, paragraph 2, of the Universal Declaration of Human Rights (hereafter "UDHR") provides:

> Everyone has the right to leave any country, including his own, and to return to his country.[5]

Article 9 further states that no one shall be subject to exile.

32. The International Covenant on Civil and Political Rights (hereafter "ICCPR"), to which Ethiopia acceded in 1993, states:

> No one shall be arbitrarily deprived of the right to enter his own country.[6]

This right has also been enshrined in regional human rights instruments from Africa, Europe, and the Americas.[7] For

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[5] Universal Declaration of Human Rights, G.A. Res. 217A, UN GAOR, 3rd Sess., Pt. I, Resolutions, at 71, UN Doc. A/810 (adopted by UN General Assembly, 10 December 1948) (hereafter "UDHR"), Article 13(2) (emphasis added).

[6] International Covenant on Civil and Political Rights (16 December 1966, entered into force 23 March 1976) (hereafter "ICCPR"), Article 12.

[7] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 Rev. 5 (26 June 1981, entered into force 21 October 1986), *reprinted in* 21 I.L.M. 59 (1982) (hereafter "African Charter"), Article 12(2); Protocol No. 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those included in the Convention and in Protocol No. 1 (as amended by Protocol No. 11) (16 September 1963, entered into force 2 May 1968), Article 3; American Convention on Human Rights, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 (22 November 1969, entered into force 18 July 1978), Article 22(5); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), Article VIII. In addition, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (7 March 1966, entered into force 4 January 1969) (hereafter "CERD"), which Ethiopia ratified in 1981, provides that the denial of the right to return is a violation of international human rights law if it is applied on discriminatory grounds.

example, Article 12(5) of the African Charter on Human and Peoples' Rights (hereafter "African Charter") mirrors the language of Article 13 of the UDHR.

33. International legal scholarship confirms that a state may not under any circumstances deport or expel its own nationals. Since World War 11:

> [I]t [has been] a firmly established rule of international law that a State may not expel or deport its own nationals.[8]

34. The statute establishing the new International Criminal Court, as well as the statutes establishing war crimes tribunals for the former Yugoslavia and Rwanda, provide that those responsible for deportations or forcible transfers are subject to individual criminal liability.

Violations of Procedural Fairness

35. Ethiopia violated international law when it failed to provide any form of legal or administrative process in the act of expelling ethnic Eritreans and Eritrean nationals. The applicable international human rights instruments explicitly provide that a decision to expel persons (even persons who, unlike the ethnic Eritreans, are not citizens of the State from which they are expelled) must be made in accord with legitimate procedures. Ethiopia violated these laws when it arrested, detained, and expelled individuals without any procedural or administrative process.

36. Article 9 of the UDHR states:

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[8] Louis B. Sohn & Thomas Buergenthal (eds.), THE MOVEMENT OF PERSONS ACROSS BORDERS 85 (1992). *See also* Jean-Marie Henckaerts, *The Current Status and Content of the Prohibition of Mass Expulsion of Aliens, 15* HUMAN RIGHTS L.J. 301 (1994); Remarks of Luke T. Lee, *Human Rights and the Movement of Persons,* American Society of International Law, Proceedings of the 78th Meeting, 342 (1984) (speaking in his personal capacity).

> No one shall be subject to arbitrary arrest, detention, or exile.[9]

37. These protections are spelled out more fully in the ICCPR. Article 9 states:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except can such grounds and in accordance with such procedure-,' as are established by law.[10]

Article 9, paragraph 2. of the ICCPR continues:

> Anyone who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him.[11]

Article 9, paragraph 4 of the ICCPR similarly provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[12]

Unlawful Confiscation of Property

38. Ethiopia's mass confiscation of property of the individuals it has expelled is directly contrary to international law. Article 17 of the Universal Declaration of Human Rights, for example, explicitly recognizes and protects the right to private property:

> 1. Everyone has the right to own property alone as well as in association with others.

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[9] UDHR, Article 9.
[10] ICCPR, Article 9.
[11] *Id.* Article 9(2).
[12] *Id.* Article 9(4).

> 2. No one shall be arbitrarily deprived of his property.[13]

Article 14 of the African Charter provides a similar protection against arbitrary deprivation of property.[14]

39. International case law also protects the right of private ownership of property. Government taking of property violates international law when it is (i) not for public purpose, or (ii) discriminatory, or (iii) not accompanied by full compensation.[15]

40. The seizure of property is also in violation of Ethiopian domestic law.

Violation of Law Prohibiting Racial or Ethnic Discrimination

41. Ethiopia targeted a particular ethnic group for deportation and expulsion. This violates specific prohibitions on non-discrimination in international law, as exemplified by Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter "CERD").[16]

Protection from Brutal and Degrading Treatment While Detained

42. Ethiopia violated international law when it incarcerated detainees in degrading conditions. Ethiopia violated the following provisions of the Geneva Convention No. IV:

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[13] UDHR, Article 17.

[14] African Charter, Article 14. *See also* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11) (20 March 1952, entered into force 18 May 1954), Article 1.

[15] *The Factory at Chorzow*, P.C.I.J. ser. A, No. 17 (1928).

[16] CERD, Articles 2, 5.

43. Ethiopia violated Article 16 when it incarcerated pregnant women, the ill, and the elderly in deplorable conditions.

44. Ethiopia violated Article 25 when it prevented civilian prisoners from contacting their families and did not notify families of an individual's arrest.

45. Ethiopia violated Article 31 of Geneva Convention (IV) when it subjected civilian detainees to physical and mental abuse.

46. Ethiopia further violated Article 31 when it used torture and death threats in an effort to coerce confessions.

47. Ethiopia violated Articles 84 through 88 when it held civilian detainees in deplorable conditions.

48. Ethiopia violated Articles 89 and 90 when it failed to provide food and clothing to the civilian detainees.

49. Ethiopia violated Articles 91 and 92 when it failed to provide internees with medical attention.

Rights of Children and Families

50. Ethiopia's policy and pattern of deportation has violated international law. The provisions of the Convention on the Rights of the Child (to which Ethiopia acceded in 1991) explicitly protect children from separation from their parents. Article 9 provides:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will ....[17]

51. Article 18 of the African Charter requires States Parties to protect the family as the "natural unit and basis of society."[18] It further requires that States ensure the protection

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[17] Convention on the Rights of the Child, 1577 U.N.T.S. 3 (20 November 1989, entered into force 2 September 1990), Article 9.

[18] African Charter, Article 18 (1).

of the rights of children in accordance with international declarations and conventions.

52. Ethiopia has also violated the law by imprisoning children prior to their deportation, especially when they are not accompanied by any older relative. The Convention on the Rights of the Child, Article 37(b) and (c), provides as follows:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.[19]

53. Ethiopia is not allowed to derogate from these obligations at any time. including during war or national emergencies.

E. Other Points at Issue

Reserved.

F. Relief or Remedy Sought

54. The State of Eritrea seeks monetary compensation for loss, damage, and injury; interest, costs, and attorneys' fees incurred in bringing this claim; and such other and further relief as is just and proper, including an order that all expellees who have been denationalized have their citizenship reinstated.

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[19] Convention on. the Rights of the Child, Article 37(b)-(c).

G. Jurisdiction

55. This is a proper claim for determination by the Claims Commission, pursuant to Article 5 of the 12 December 2000 Comprehensive Peace Agreement, in that it asserts claims for loss, damage, or injury by the State of Eritrea against the Federal Republic of Ethiopia that: (a) are related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

56. The foregoing claims fall within the temporal scope of the jurisdiction of the Claims Commission, as the events giving rise to the claims occurred between May 1998 and 12 December 2000; arose as a result of the armed conflict between the parties; or occurred in the course of measures to disengage the contending forces or otherwise to end the military confrontation between the two sides.

H. Other Fora

57. This claim has not been filed in any other forum.

Annex A
List of Evidence

Pursuant to Rule 24(1), Eritrea submits the following list of evidence that it may submit:

1) Written affidavits of victims, witnesses and expert witnesses;
2) Ethiopian Passports and other Identity Documents;
3) Licenses;
4) Government Records,
5) Bank Books;
6) Business Ledgers;
7) Correspondence;
8) Reports form Non-Governmental Organizations;
9) United Nations Reports,
10) World Bank Reports;
11) Reports Compiled by the Governmental of Ethiopia;
12) Reports Compiled by the Government of Eritrea;
13) Reports Compiled by the University of Asmara;
14) International News Reports;
15) Ethiopian News Reports from Private and State Owned Newspapers;
16) Eritrean News Reports;
17) Maps;
18) Photographs;
19) Videotape; and
20) Oral witness testimony.

Submission

The State of Eritrea, which reserves the right to supplement and develop its claim further in subsequent pleadings and oral argument, respectfully submits the attached Statement of Claim.

/s/ Ali Said Abdella

Ali Said Abdella
Foreign Minister, the State of Eritrea
Agent of the Government of the State of Eritrea

ERITREA - ETHIOPIA CLAIMS COMMISSION

The STATE OF ERITREA

Claimant,

- against -

The FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

Respondent.

STATEMENT OF CLAIM ON BEHALF OF HIWOT NEMARIAM

1. Claimant, the State of Eritrea ("Eritrea'') hereby notifies Respondent, the Federal Democratic Republic of Ethiopia ("Ethiopia") that it demands arbitration of the claims of Hiwot Nemariam pursuant to Article 24 of the Rules of Procedure of the Eritrea Ethiopia Claims Commission ("Rules of Procedure"), and Article 5 of the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, dated December 12, 2000 (the "Peace Agreement").

2. Eritrea brings this action on behalf of HIWOT NEMARIAM, a denationalized Ethiopian citizen of Eritrean origin, who was unlawfully arrested, detained and expelled from Ethiopia on July 6, 1998, and whose bank accounts and other property were confiscated by Ethiopia. Ms. Hiwot has not received any compensation for her confiscated property or for the injuries suffered during her arrest, detention and expulsion. Eritrea seeks damages on behalf of Ms. Hiwot equal to the value of her confiscated property, compensatory damages for the harm. suffered on account of her unlawful detention, expulsion,

denationalization and displacement, plus interest, cost and fees.

JURISDICTION

3. The Claims Commission has jurisdiction over this action pursuant to Article 5, paragraph 1 of the Peace Agreement, which declares, in relevant part, that:

> 1. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

4. The takings claim presented herein by Eritrea was filed, as part of a class action, in the United States District Court for the District of Columbia on June 12, 2000. *See Hiwot Nemariam, et al. v. Ethiopia and the Commercial Bank of Ethiopia,* Civ. 00-CV-1392-TPJ. On August 2, 2001, upon the defendants' motion, the District Court dismissed the case without prejudice on *forum non conveniens* grounds, in favor of this Claims Commission. That decision is currently pending appeal by the plaintiffs.

5. Article 5, paragraph 8, of the. Peace Agreement states, in relevant part:

> Except for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to [December 12, 2000], the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this article[.]

Eritrea stated its position to the District Court that the establishment of the Commission should not in any way affect the plaintiffs' right to proceed in the *Hiwot Nemariam* case, and reiterates that position here: Eritrea does not intend this filing to interfere in any way with Ms. Hiwot's right to proceed in that case.

PARTIES

6. The name and address of the claimant is:

State of Eritrea
c/o Ministry of Foreign Affairs
Asmara, Eritrea

Correspondence to be addressed to:

Office of the Legal Advisor to the Office of the President
Asmara, Eritrea
Telephone (291) (1) 20-12-60
Fax (291) (1) 12-21-42
e-mail legaladv@eol.com.er

7. Eritrea brings this action on behalf of Hiwot Nemariam, who is now a citizen of Eritrea, pursuant to Article 24 of the Rules of Procedure. Ms. Hiwot currently resides in Asmara, Eritrea.

STATEMENT OF THE FACTS

Expulsions of "Eritreans" From Ethiopia

8. In June 1998, after the start of the war between Ethiopia and Eritrea, Ethiopia began a program of publicly identifying, detaining, and expelling from Ethiopia persons it deemed to be Eritrean or of Eritrean origin or descent.

9. On or about June 12, 1998, an Ethiopian government spokesperson announced that Ethiopia's security apparatus had uncovered lists of Eritreans living in Ethiopia "who were engaged in spying and mobilizing financial and other resources to support the Eritrean aggression." The same day, the Ethiopian Ministry of Foreign Affairs issued a press release entitled "Precautionary Measures Taken Regarding Eritreans Residing in Ethiopia."[1] According to the press release, officials of the Eritrean Peoples' Liberation Front in Addis Ababa, leaders and senior functionaries of the Eritrean Community Organization in Addis Ababa, and other individuals of Eritrean origin or descent accused of "taking advantage of their residence in Ethiopia" and "raising money for the Eritrean war effort" or being "involved in spying activities" were required to leave Ethiopia. *Id.*

10. The press release claimed that the property of these Eritreans would "not be confiscated" and that they would be "allowed to nominate an agent/agents to look after their interests." *Id.* In the days that followed, the Ethiopian Ministry of Foreign Affairs represented to the international community that deportations would follow a three-part process: (i) determination of which Ethiopians of Eritrean descent were in fact Eritrean citizens; (ii) determination of which categories of alien Eritreans constituted a national

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[1] Available at <http://www.ethemis.se/s980612.2htm>

security risk; and (iii) deportation of such individuals, fully respecting due process and the right of appeal, preserving their property rights, and abiding by international human rights law.

11. In practice, Ethiopia began a campaign of mass expulsion of persons of Eritrean origin or descent without notice or due process. This campaign did not follow the three-part process articulated by the Ministry of Foreign Affairs. Instead, Ethiopia singled out tens of thousands of people on the basis of their Eritrean origin or descent, classified them as a group designated "Eritreans," and, based on that classification, treated them as foreign nationals and targeted them for discriminatory treatment. Ethiopia's Immigration Office assembled lists of "Eritreans" based on their birth in Eritrea, membership in Eritrean organizations or the fact that they voted or were eligible to vote in the 1993 Eritrean referendum on independence. According to the Ethiopian Government, anyone appearing on those lists is Eritrean and cannot be an Ethiopian citizen. Ethiopia therefore stripped the citizenship of all "Eritreans" who had up to that time been Ethiopian citizens. In mid-August 1999, Ethiopia required all "Eritreans" 18 years of age and older to register with the Government.

12. Expulsions of individuals of Eritrean origin or descent typically were carried out according to a similar pattern. Ethiopian security officers arrested the "Eritreans" and jailed them in police stations. Some of these arrests, including arrests of pregnant women, children and the elderly, took place in the middle of the night. Next, deportees were forced aboard buses and driven either to a holding area or directly to the Eritrean border, a trip that sometimes took upwards of nine days. This bus journey was harrowing, humiliating and dangerous. Due to the extreme heat, unsanitary conditions and lack of food or drink provided, many deportees became ill en route.

Bank Accounts and Other Property of "Eritreans" Were Seized

13. On or about June 12, 1998, at the same time that Ethiopia initiated the expulsions, the Ethiopian Government also issued an order freezing the bank accounts of persons of Eritrean origin or descent, which prevented any access to or withdrawal of funds from these accounts.

14. Ethiopia also seized other property owned by persons of Eritrean origin or descent, who were deported from or otherwise forced to leave or remain away from Ethiopia. In many instances, Ethiopia caused such property to be auctioned off by the Commercial Bank of Ethiopia ("CBE") for the benefit of CBE and Ethiopia.

15. Moreover, persons of Eritrean origin or descent who were summarily expelled from Ethiopia were also forced to abandon other property, including their homes, businesses, cars, furniture and various personal effects.

16. Only persons of Eritrean origin or descent whom Ethiopia treated as "Eritrean" have been subjected to the summary deportation and confiscation of property described above. No other groups were singled out by nationality, ethnicity, citizenship or otherwise for similar mistreatment at the hands of the Ethiopian authorities or the agents and instrumentalities of Ethiopia.

International Condemnation of Mass Expulsions of Eritreans

17. The United Nations, the United States, and independent, international nongovernmental organizations have all documented and condemned Ethiopia's mass detentions and expulsions of and related acts against people of Eritrean origin or descent. In a press release dated July l, 1998, United Nations High Commissioner for

Human Rights Mary Robinson said she was "deeply concerned by the violation of human rights of Eritrean nationals being expelled from Ethiopia, and particularly by the fact that their passports are being stamped 'expelled, never to return."[2] She stated that "[t]hese are serious violations of the rights and freedoms set forth in the Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights, to which Ethiopia is a party." *Id.*

18. In an August 6, 1998, press release, the United States Department of State said that "[t]he United States views with deep concern the detention and expulsion of ethnic Eritreans in and from Ethiopia."[3] The State Department found that there were "fundamental humanitarian and human rights concerns raised by the forcible separation of families, the undue hardships of those detained or expelled to Eritrea, and the financial losses caused by sudden expulsions." *Id.* It urged Ethiopia "to allow all those who were wrongfully expelled to return and to establish a compensation commission to investigate and recommend compensation for the claims resulting from undue financial loss and hardship as the result of rapid, forced expulsions." *Id.*

19. The State Department's 1998 Country Report on Human Rights Practices for Ethiopia similarly concluded that Ethiopia had "abrogated due process and detained and deported Eritreans and Ethiopian citizens of Eritrean origin."[4] The Report further stated that these "sudden expulsions raised fundamental concerns regarding arbitrary arrest and detention,

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2 *Available at* <http://www.unhcr.ch/Huricane/Huricane.nsf/94ed9fed71c04647802566100031b4bd/990066e6a0fdffe80256636004c86a6?/OpenDocument>

3 *Available at* <http://secretary.state.gov/www/briefings/statements/1998/ps980806.html>

4 *Available at* <http://www.state.gov/www/global/human_rights/1998_hrp_ report/ Ethiopia.html>

forced exile, the forcible separation of families, nationality issues, and the hardship and financial losses suffered by those who were detained or expelled." *Id.*

20. The State Department reiterated these criticisms in its 1999 and 2000 Country Reports for Ethiopia. In 2000, the Report stated, "The [Ethiopian] Government's actions raised serious issues of due process since there were no preliminary hearings to determine the merits of the deportations, no right to counsel was provided to detainees, and detainees only had a very circumscribed opportunity to register protests."[5]

21. In a January 1999 report entitled "Amnesty International Witnesses Cruelty of Mass Depeportations," Amnesty echoed the U.N. and governmental condemnation.[6] Similarly, Human Rights Watch detailed and described the mass arrests and deportations in its 1999, 2000 and 2001 World Reports.[7]

Actions Taken Against Hiwot Nemariam

22. Hiwot Nemariam is 70 years old. She was born in Asmara, Eritrea, on February 12, 1931, when Eritrea was still an Italian colony. *See* Declaration of Hiwot Nemariam dated February 2001 ("Hiwot Decl."), attached hereto as Appendix A, ¶ 2. Ms. Hiwot moved with her family to Addis Ababa, Ethiopia, in 1972, when Eritrea was part of Ethiopia. She resided there until her expulsion in 1998. *Id.* ¶ 3. She voted in the Ethiopian federal elections in 1995. *Id.* ¶ 3. At the time of her expulsion,

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5 *Available at* <http://www.state.gov/www/global/human _rights/2000_hrp_report/ Ethiopia.html>

6 *Available at* <http://www.amnesty.org/news/1999/ 12500299.html>

7 *Available at* <http://www.hrw.org/worldreport99lafrica/ethiopia. html>;<http://www.hrw.org/wr2k/Africa-03.htm #TopOfPage>; <http://www.hrw.org/wr2kl/Africa/ethiopia.html>

Ms. Hiwot carried an Ethiopian passport, No. E061512, issued on May 18, 1990. *Id.*, Exhibit 1. She also had an Ethiopian identity card, which was seized and destroyed following her arrest.

23. Ms. Hiwot was married to Belay Redda on February 5, 1946. They have four children, all of whom are now United States citizens. *Id.* ¶ 2. Mr. Belay was a member of the Ethiopian civil service for 36 years, serving with distinction and holding positions including Director of Transport Department, Director of Industry and Commerce Head Office, and Director-General of the Tax Office of the Ministry of Finance. Mr. Belay was arrested and expelled from Ethiopia on June 13, 1998. Mr. Belay has also petitioned the Eritrean government to present his claims to the Claims Commission. *See generally,* Statement of Claim on Behalf of Belay Redda.

24. On or about June 13, 1998, at approximately 1:00 p.m., five Ethiopian police and military officials, armed with machine guns, arrested Hiwot Nemariam's husband Belay Redda while he was alone at the family-owned dry cleaning business in Addis Ababa. Hiwot Decl. ¶ 5. He was expelled from the country the following day.

25. Hiwot Nemariam remained in Ethiopia for approximately two weeks after her husband, Mr. Belay, was arrested and deported. Id. ¶¶ 10-11. Around the time of her husband's deportation, Ms. Hiwot heard that Ethiopian Prime Minister Meles Zenawi had announced on the radio, in newspapers and on television that the families of deportees would be allowed to remain and work in Ethiopia. Id ¶ 5. Acting in reliance on that announcement, Ms. Hiwot did nothing to liquidate her family's assets. She did, however, pay all back-taxes that existed on the family business and received a certificate of clearance to document that the property was unencumbered. *Id.* ¶ 7.

26. Five or six Ethiopian authorities from the *kebele* (district administration and governance) then came to Mr. Belay's and Ms. Hiwot's dry-cleaning business and demanded she show them her business papers, licenses, utility and tax records. Without revealing the purpose of their visit, they were threatening and intimidating toward her. *Id.* ¶ 7.

27. A few days later, Ms. Hiwot attempted to withdraw funds from the joint account she shares with her husband at the Tedros Square Branch of CBE. She was informed that her account was inaccessible, and that "Eritrean accounts are blocked." The bank official named other Ethiopians of Eritrean origin or descent with frozen bank accounts. *Id.* ¶ 8.

28. Later that week, *kebele* officials told Ms. Hiwot to report to the *kebele* at 3 p.m. When she arrived, the Ethiopian officials told her that she would be leaving in one month, and that she should prepare to depart by selling all of her belongings. Ms. Hiwot said that this was impossible, and the officials told her that if she could not sell her property, the government would take action over the property. *Id.* ¶ 9.

29. On or about July 3, 1998, Ms. Hiwot was arrested at her house at approximately 3:00 a.m. by seven or eight military officers armed with machine guns. *Id* ¶ 11. She was detained in an auditorium with 90 other men, women, and children, most of whom she was able to recognize as individuals of Eritrean origin or descent from her community. The authorities destroyed her Ethiopian identity card. *Id.* ¶ 12.

30. Over the course of the next three days, Ms. Hiwot was interrogated about her connection to the Eritrean government, photographed and told that she was being deported because she was "Eritrean." *Id.* ¶ 13. Ms. Hiwot was not provided any food, water or space to sit or rest during the entirety of her detention. *Id.* ¶ 12. She was not given the opportunity to contact anyone or told what would happen to her or her property. She was not told whether she had a right to a hearing or appeal. She saw some workers from the International Committee for the Red Cross

enter the auditorium, but they told the group there was nothing they could do for them.

31. On or about July 6, 1998, Ms. Hiwot was loaded onto a bus with approximately 70 other detainees, and she experienced a harrowing five-day journey to the border. Ms. Hiwot and the others were dropped off at the Ethiopian border and left to make the walk to Adi Ugri, the nearest town in Eritrea. *Id.* ¶ 15.

32. Ms. Hiwot has been unable to return to Ethiopia since her expulsion, and thus has been unable to access her money on deposit with the CBE or her other property (even if it were not subject to the seizure order). Ethiopian banking law does not permit personal checking accounts and requires holders of savings accounts to appear in person to withdraw funds. There is no automated teller network for Ethiopian banks, and wire transfers out of personal accounts are not permitted. Due to the Ethiopian Government's seizure order, and due to her deportation, Ms. Hiwot has been deprived of access to those accounts held by her, her husband, or jointly by her and her husband. The bank accounts currently held by CBE as follows *(see generally* Statement on Behalf of Belay Redda):

- two Certificates of Deposit: CD #38453, at the M. Gandhi Road Branch of CBE, worth 1,125,291.56 Birr (approximately U.S. $160,865)[8]; and CD #1669, at the Tedros Square branch of CBE, worth 304,585.57 Birr (approximately U.S. $43,540); and

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[8] The U.S. dollar value of confiscated assets has been calculated using the Birr to dollar exchange rate of June 12, 1998 - the date when the Ethiopian Government initiated expulsions of persons of Eritrean origin, descent or nationality and issued the order freezing their bank accounts. The exchange rate then was 0.14295228 dollars to the Birr.

- two savings accounts: Account No. 16296, at the M. Gandhi Road Branch of CBE, with a balance of 21,382.33 Birr (approximately U.S. $3,055); and Account No. 10136, at the Tedros Square Branch of CBE, with a balance of 54,014.39 Birr (approximately U.S. $7,720); and
- one checking account: Account No. 209, at the M. Gandhi Road Branch of CBE, for the dry cleaning business, with a balance of 10,000 Birr (approximately U.S. $1,430).

33. Following Ms. Hiwot's deportation, CBE, at the behest of Ethiopia, sold her family's dry cleaning business, worth an estimated 2 million Birr (approximately U.S. $285,900), at a public auction for approximately 1% of its fair market value. The business was auctioned under the pretext that the property was burdened by a tax debt but, in fact, the property was documented to be unencumbered. *See* Declaration of Belay Redda, attached hereto as Appendix B.

34. After her deportation, an acquaintance of Ms. Hiwot and Mr. Belay, Ms. Aster Araia, tried to protest the confiscation of their property and to prove that no taxes were owed. The Ethiopian authorities told her to stop interfering. Id. .

35. Ms. Hiwot has been deprived of all use, enjoyment or opportunity to dispose of her property since her expulsion from Ethiopia. She has not received any indication that she will see the return of her property or be paid compensation therefor. In light of all of the circumstances, Ms. Hiwot has no prospect that she will ever recover her property or receive compensation for its confiscation.

Claim I

Unlawful Taking of Property

36. Ethiopia, in arbitrarily seizing and disposing of the property of Ms. Hiwot, has taken her property in violation of applicable municipal law, including Eritrean and Ethiopian law, and in violation of international law.

37. The taking of Ms. Hiwot's property violated Article 40 of the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter Ethiopian Constitution), which details extensive rights to keep and use property, and which states that government may expropriate private property for public purposes only if it pays "in advance compensation commensurate to the value of the property." Ethiopian Constitution, Art. 40(8).

38. It is well-established that a government taking of property violates international law when it is (*i*) not for a public purpose, or (*ii*) discriminatory, or (*iii*) not accompanied by full compensation. *See, e.g., The Factory at Chorzow*, P.C.I.J. ser. A, No. 17 (1928). Article 17(2) of the Universal Declaration of Human Rights guarantees that "no one shall be arbitrarily deprived of his property."[9] The International Covenant on Civil and Political Rights provides that "in no case may a people be deprived of its own means of subsistence."[10]

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[9] G.A. Res. 217(A)(III), U.N. Doc. A/810 at 71 (1948) (hereinafter UDHR).

[10] Art. 1(2).G.A. Res. 2200(A)(XXI), 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 at 52, 999 U.N.T.S. 171 , *entered into force* Mar. 23, 1976 (hereinafter ICCPR). The Federal Democratic Republic of Ethiopia ratified the International Covenant on Civil and Political Rights on June 11, 1993. The identical language is also contained in Article 1(2) of the International Covenant on Economic, Social, and Cultural Rights, GA. Res. 2200(A) (XXI), 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 at 490993 U.N.T.S. 3, *entered into force* January 3, 1976. Ethiopia ratified

39. Further, the African Charter on Human Rights states that "the right to property shall be guaranteed," with very limited power of eminent domain.[11]

40. Ethiopia has taken Ms. Hiwot's property without a public purpose, in a discriminatory manner and without compensation. Accordingly, Ethiopia's conduct constitutes an actual confiscation of Ms. Hiwot's property or, at a minimum, has interfered with Ms. Hiwot's property rights to such a substantial degree and for such an extended period as to amount to a taking of that property under international law and the Ethiopian Constitution.

41. Ms. Hiwot estimates her total losses, including household goods; personal property, the above-listed bank accounts, cash and other valuables, at over 6 million Birr, or approximately U.S. $857,715. *Id.*

42. An award of damages is the appropriate remedy in these circumstances for this illegal taking of property.

Claim II

Unlawful Displacement

43. Ethiopia, in removing Ms. Hiwot from her home and expelling her from the country, has violated international law against displacement and the Ethiopian Constitution.

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the International Covenant on Economic, Social and Cultural Rights in 1993.

[11] Art. 14. OAU Doc. CAB/LEG/67/3 rev. 5,21 I.L.M. 58 (1982), *adopted* Jan. 27, 1981, *entered into force* Oct 21, 1986 (hereinafter African Charter). *See* also European Convention on Human Rights, Rights (hereinafter ECHR), Protocol 1, E.T.S. 9,213 U.N.T.S. 262, *entered into force May* 18, 1952, Article 1 ("Every person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except, except in the public interest and subject to the conditions provided for by law and by the general principles of international law.")

44. This norm of international law was codified in the Universal Declaration of Human Rights, which guarantees that "everyone has the right to freedom of... residence," and "everyone has the right... to return to his country."[12] The ICCPR similarly provides that all citizens "have the right to liberty of movement and freedom to choose his residence." ICCPR, Art. 12. The African Charter also protects the "freedom of movement and residence." African Charter, Art. 12(1).

45. The displacement of Ms. Hiwot also violated Article 32 of the Ethiopian Constitution, which guarantees that every person has the "freedom to choose his residence."

46. Ethiopia's actions, in displacing Hiwot Nemariam, were precisely targeted to permanently deprive her of her home and businesses. As such, these actions violated international law and the Ethiopian Constitution, for which Hiwot Nemariam is entitled to compensation.

Claim III

Unlawful Detention

47. Ethiopia, in arbitrarily arresting and detaining Hiwot Nemariam without due process, violated well-established international law and the Ethiopian Constitution.

48. Article 9 of the UDHR explicitly prohibits "arbitrary arrest, detention, or exile." Similarly the African Charter states clearly that "no one may be arbitrarily arrested or detained." African Charter, Art. 6.

49. The ICCPR defines unlawful arrest and detention as:

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[12] UDHR, At. 13(1); Art. 13(2).

(1) an arbitrary arrest;

(2) an arrest not in accordance with such procedure as established by law;

(3) an arrest without the detainee being informed of the reasons for the arrest and the charges against him or her; or

(4) being arrested without being brought promptly before a judge.

ICCPR, Art. 9. The arrest and detention of Hiwot Nemariam violated all four of these categories. Furthermore, Article 9(5) of the ICCPR entitles anyone who suffers an unlawful arrest or detention to an "enforceable right to compensation."

50. The arrest and detention of Ms. Hiwot also violated Article 17(2) of the Ethiopian Constitution, which guarantees that no person will be subject to "arbitrary arrest, and no person may be detained without a charge or conviction against him." Further, these actions were in breach of Article 19 of the Ethiopian Constitution, which lists the rights of people being detained, including the right to be brought before a judge within 48 hours.

51. Because Ethiopia arbitrarily arrested, detained, and expelled Hiwot Nemariam, and because no efforts were made to inform Ms. Hiwot of any charges or to bring Ms. Hiwot before a judge, Ethiopia has committed an egregious violation of international law and its own Constitution, for which Ms. Hiwot is entitled to compensation.

Claim IV

Unlawful Expulsion

52. Ethiopia, in expelling Hiwot Nemariam, violated international law against unlawful expulsion and the Ethiopian Constitution.

53. The Universal Declaration of Human Rights guarantees that "no one shall be subject to...exile," and "everyone has the right...to return to his country."[13] The ICCPR similarly requires that all people "have the right to liberty of movement and freedom to choose his residence." ICCPR, Art. 12. Further, the African Charter explicitly forbids the "mass expulsion" of citizens such as Ethiopia's expulsion of tens of thousands of its own citizens. African Charter, Art. 12.[14]

54. The expulsion of Ms. Hiwot also violated Article 32 of the Ethiopian Constitution, which guarantees that "any Ethiopian national has the right to return to his country."

55. Moreover, Ms. Hiwot's expulsion violated international law even if Ethiopia claims she was not a citizen at the time. The ICCPR expressly provides that an alien may be expelled "only in pursuance of a decision reached in accordance with law," a condition precedent clearly not met in the case of Ms. Hiwot. ICCPR, Art. 13.[15] The African Charter explicitly forbids discriminatory mass expulsion, such as the expulsion of tens of thousands of Eritreans from Ethiopia in which context Ms. Hiwot was expelled. African Charter, Art. 12. American and European human rights

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[13] Id., Art. 9; Art. 13(2).

[14] American and European human rights treaties also expressly prohibit the expulsion of citizens. *See* ECHR, Protocol IV, E.T.S. 46, I.L.M. 978, *entered into force* May 2, 1968, Art. 3; American Convention on Human Rights, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, January 7, 1970, 9 I.L.M. 101, *entered into force* July 18, 1978 (hereinafter ACHR), Art. 22(5).

[15] Note that the U.N. Human Rights Committee has determined that "Article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions." U.N. Doc. A/41/40, Annex V1, paras. 9-10, 1986.

treaties also prohibit the collective expulsion of aliens. See ECHR, Protocol IV;[16] ACHR, Art. 22(9).[17]

56. Ethiopia's expulsion of Hiwot Nemariam from Ethiopia prevents Ms. Hiwot from returning to her home and business in Ethiopia. As such, these actions violated international law and the Ethiopian Constitution.

Claim V

Denationalization

57. Ethiopia stripped Hiwot Nemariam of her Ethiopian citizenship. Such denationalization is forbidden by Article 15 of the UDHR, which provides:

1) Everyone has a right to a nationality

2) No one shall be arbitrarily deprived of his nationality[.]

58. Ethiopia's denationalization of Ms. Hiwot also violated Article 33(1) of the Ethiopian Constitution which provides: "No Ethiopian shall be deprived of his or her Ethiopian nationality against his or her will."

59. This act of denationalization by the Ethiopian government against Hiwot Nemariam is a violation of both

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16 *See Becker v. Denmark,* Decision of the European Commission of Human Rights as to the Admissibility of Application 7011/75, 19 *Y.B. Ear. Conv. On. H.R. 416* (1976) (holding that expulsion could only be permissible when taken after a "reasonable and object examination of the particular cases of each alien group.")

17 Moreover, commentators find that mass expulsions of aliens, without due process, during or at the beginning of a war violate humanitarian law as set forth in the Fourth Geneva Convention. *See* JEAN PICTET (ED.), COMMENTARY TO THE IVTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 266 (1958).

international law and Ethiopian law, and damages should be assessed accordingly.

RELIEF SOUGHT

60. Eritrea, on behalf of Hiwot Nemariam, respectfully requests an award:

a. awarding Eritrea on behalf of Hiwot Nemariam damages in an amount reflecting the fair market value of her property at the time of its confiscation;

b. awarding Eritrea on behalf of Hiwot Nemariam compensatory damages for the harm suffered in an amount to be determined by the Commission;

c. awarding interest accrued and costs and fees incurred in bringing this claim;

d. granting such other and further relief as is just and proper.

CONCLUSION

61. Eritrea reserves the right to supplement or amend this Statement of Claim, and to submit further documents and evidence as it may deem necessary or appropriate.

TITLE 28--JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 97--JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

. . .

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

No. 03-106

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
and THE COMMERCIAL BANK OF ETHIOPIA,

Petitioners,

v.

HIWOT NEMARIAM; BELAY REDDA; SERTZU GEBREMESKEL; MEBRAHTU GEBREMEDHIN; FEKADU ANDEMESKAL; and MEBRAT GEBREAMLAK, widow and personal representative of the estate of TEDROS ASFAHA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

DONALD FRANCIS DONOVAN
Counsel of Record
MICHAEL M. OSTROVE
KATHERINE BIRMINGHAM WILMORE
CAROLINE H. LUCKENBACH
ROBERT WILLIAM YALEN
DAVID M. BIGGE
JESSICA BANNON VANTO
MATTHEW M. RICCARDI
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, NY 10022
(212) 909-6000

Counsel for Respondents

(additional counsel listed on inside cover)

August 25, 2003

JAMES SILK
LOWENSTEIN INTERNATIONAL
HUMAN RIGHTS CLINIC
P.O. Box 208215
New Haven, CT 06520

GREGORY H. FOX
WAYNE STATE UNIVERSITY LAW SCHOOL
471 West Palmer
Room 3377
Detroit, MI 48202

NOAH NOVOGRODSKY
UNIVERSITY OF TORONTO,
FACULTY OF LAW
78 Queen's Park
Toronto, Ontario
Canada M5S 2C5

Counsel for Respondents

QUESTION PRESENTED

Whether the Court of Appeals correctly held that defendants had failed to meet the well settled requirement of *Gulf Oil v. Gilbert* and *Piper Aircraft Co. v. Reyno* that a party moving to dismiss on *forum non conveniens* grounds must first establish the existence of an adequate alternative forum because, applying the equally settled teaching of *Piper*, plaintiffs had a right to "no remedy at all," even on a meritorious claim, from the interstate claims commission that defendants proferred as the alternative forum.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Nature of the Claims

Respondents brought this action against Petitioners, the Federal Democratic Republic of Ethiopia ("Ethiopia") and the Commercial Bank of Ethiopia ("CBE") seeking recovery for themselves and a class of similarly situated individuals for Petitioners' takings of their CBE bank accounts and other property without compensation as part of Ethiopia's discriminatory campaign, including mass expulsions, against persons of Eritrean nationality, origin or descent during a two-year border war between Ethiopia and Eritrea. Respondents found the case on 28 U.S.C. § 1605(a)(3), the international takings exception of the Foreign Sovereign Immunities Act.

In May 1998, a longstanding border dispute between Eritrea and Ethiopia erupted into a general armed conflict. Pet. App. 2a. Within a month, Ethiopia began arresting, detaining and expelling people who, like Respondents, were of Eritrean nationality, origin or descent, and confiscating property they left behind. *Id.* Ethiopia ordered banks, including principally CBE, to freeze all accounts held by individuals it identified as "Eritreans," including Respondents. This action rendered the accounts inaccessible to Respondents and the class prior to their deportation and permanently inaccessible afterward, as withdrawals from

individual accounts in Ethiopia may be made only by the account-holder, in person. Without notice or process, CBE foreclosed on or otherwise seized remaining property left behind by deportees. *Id.*

In June 2000, Respondents filed a two-count complaint against Petitioners Ethiopia and CBE. Respondents, including a U.S. citizen and a U.S. lawful permanent resident who was granted political asylum from Eritrea, are individuals of Eritrean descent whose property was confiscated by Respondents in the manner described in violation of international law. Ethiopia is a sovereign state. CBE, which is wholly owned by the Ethiopian government, Pet. 2, is engaged in extensive commercial activity in the United States through, among other things, its various correspondent banking accounts, which handle hundreds of millions of U.S. dollar transactions annually for CBE from which CBE derives substantial profits. *See* First Amended Complaint, dated June 8, 2001 ¶ 30.

On December 12, 2000, six months after Respondents had filed their Complaint, Eritrea and Ethiopia entered into the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea ("Agreement") that formally ended the conflict. Pet. App. 2a; *see* Pet. App. 24a. Anthony Lake, President Clinton's Special Envoy, played a central role in bringing the warring states to agreement, and State Department negotiators drafted the Agreement to reflect the concerns and understanding of Eritrea and Ethiopia. Pet. App. 38a-39a; *see also* Respondents' Appendix 3a-4a, 7a-8a. Madeleine Albright, Secretary of State of the United States, and Kofi Annan, Secretary General of the United Nations, signed the Agreement as witnesses. Pet. App. 34a.

Article 5 of the Agreement created the Eritrea-Ethiopia Claims Commission to resolve claims between the two states arising from the war. Pet. App. 2a-3a. By the terms of Article 5, only the States Party to the Agreement, Eritrea and Ethiopia, may bring claims before the Commission, including claims "on behalf of [their] nationals" and "on behalf of persons of Ethiopian or Eritrean origin who may not be [their] nationals." Pet. App. 3a. The Agreement vests in the Commission exclusive jurisdiction over all claims arising from the conflict, "[e]xcept for claims . . . filed in another forum prior to the effective date of this Agreement." *Id.* The Agreement also provides that "any claims which could have been and were not submitted by [the specified] deadline [were] extinguished, in accordance with international law." Pet. App. 31a-32a.

The uncontroverted evidence in the record on appeal established that the carve-out for claims pending in another forum from the otherwise exclusive jurisdiction of the Claims Commission was sought by Eritrea and included in the Agreement specifically in order to permit this case to go forward. Resp. App. 3a-4a, 7a-8a. While Eritrea was prepared to establish the Commission as the otherwise exclusive forum for claims between the two states, it took the position in negotiations that it "could not sign an agreement that would potentially adversely affect the rights of persons of Eritrean national origin in an on-going case." Resp. App. 8a. Eritrean representatives explained its position to the State Department representative at the peace negotiations, and the State Department drafted the language in Article 5(8) that satisfied Eritrea's concern. Resp. App. 3a-4a. In that manner, "Ethiopia's agreement to this position was obtained." Resp. App. 7a.

B. Proceedings Below

On August 2, 2001, on Petitioners' motion, the District Court dismissed the complaint on the ground of *forum non conveniens* in favor of the Claims Commission. It held that the Claims Commission was an adequate alternative forum because, although Respondents could not bring claims there themselves, Eritrea could bring claims on their behalf. Pet. App. 19a-20a. The Court then found that the private and public interest factors favored the Commission. Pet. App. 20a-21a. Dismissing without prejudice, the District Court provided that "the case is subject to reinstatement for good cause shown if named plaintiffs' claims are not submitted to the Claims Commission by the government of Eritrea despite affirmative, timely request therefore [sic] by plaintiffs." *Id.*

In light of the terms of the dismissal, Respondents requested that Eritrea submit claims on their behalf before the Claims Commission. On December 12, 2001, Eritrea filed claims on behalf of each named Respondent, as well as a claim on behalf of "Persons Expelled from Ethiopia." Pet. App. 41a-76a; C.A. Joint App. A612-A705. On June 15, 2002, Ethiopia filed Statements of Defense to the claims Eritrea filed on behalf of Respondents, asserting, among other defenses, that they are not "valid claims against Ethiopia under Article 5 of the Peace Agreement." C.A. Joint App. A741-A808. Eritrea filed memorials in support of these claims in November 2002. There have been no further memorials or hearings to date.

On appeal, Respondents argued that (*i*) the Commission is an inadequate alternative forum because, even if Respondents prevail on their claims, they have no right to a remedy from the Commission; (*ii*) the Commission is an inadequate alternative forum because Respondents may not themselves file claims before the Commission and they have

no control over the claims Eritrea filed on their behalf; (*iii*) the District Court misapplied the private and public interest factors; and (*iv*) Ethiopia waived its right to seek dismissal on the basis of *forum non conveniens* when it agreed that "the Commission shall be the sole forum for adjudicating claims . . . except for . . . claims filed in another forum prior to the effective date of this [Peace] Agreement." Pet. App. 5a-6a.

On January 24, 2003, the Court of Appeals reversed, upholding Respondents' first argument and hence reaching no others. Pet. App. 1a-9a. The Court first reviewed the terms of Article 5, including the carve-out of Article 5(8), and the mandate of the Claims Commission. Pet. App. 3a. The Court found that the Commission cannot award any relief directly to Respondents. Pet. App. 6a. The Court noted that although Eritrea may bring claims on behalf of Respondents, "Eritrea would presumably control the disposition of any resulting award," and was not bound by any stated intention to give directly to the claimants any award received for takings of private property. Pet. App. 6a-7a. Noting further that Eritrea had itself advised the Commission that "practical difficulties of individual distribution might outweigh the desirability of individualized compensation," the Court concluded that "Ethiopia is unable to substantiate its claim that Nemariam will receive a remedy if Eritrea succeeds in prosecuting her claim before the Commission." Pet. App. 7a-8a. The Court therefore held the Commission an inadequate alternative forum for purposes of the threshold requirement of forum non conveniens analysis, as "the 'remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.'" Pet. App. 8a (quoting *Piper Aircraft v. Reyno*, 454 U.S. 235, 254 (1981)).

On April 18, 2002, the Court of Appeals denied Petitioners' petition for rehearing or rehearing en banc, no member of the Court having requested a vote. On May 21, 2003, the Court of Appeals denied Petitioners' request for a stay of the mandate pending this Court's ruling on their petition for certiorari.

REASONS FOR DENYING THE PETITION

The decision of the Court of Appeals represents a straightforward application of well settled principles of *forum non conveniens* that Petitioners do not contest, and it arises in circumstances that will rarely if ever recur. The decision does not conflict with any decisions of this Court or of any other Court of Appeals, and it does not conflict with U.S. policies regarding state espousal of claims before international tribunals, international arbitration generally, or the assertion in U.S. courts of claims arising outside the United States. The proceedings below did not depart from the accepted course of judicial proceedings. The decision below does not raise an important federal question that this Court should settle. In short, the Petition invokes none of the considerations favoring a grant of certiorari listed in Rule 10 of the Rules of the Supreme Court of the United States, and it should be denied.

I. THE DECISION BELOW DOES NOT CONFLICT WITH *PIPER* OR ANY OTHER *FORUM NON CONVENIENS* DECISION OF THIS COURT OR ANY OTHER CIRCUIT.

A. The Decision Reflects a Routine Application of *Piper*.

Petitioners assert that the decision below is "in conflict with this Court's decision in *Piper*." Pet. 8 (point heading I). Petitioners identify no legal standard set forth in *Piper* that the Court of Appeals misstated or failed to apply, however. To the contrary, Petitioners concede that the Court of Appeals "quot[ed] the applicable language from *Piper* (454 U.S. at 254)." Pet. 17 (noting also that the Court of Appeals "quoted the *Piper* standard"). In other words, Petitioners merely quibble with the application of a legal standard that

they concede was both relevant and correctly stated. Petitioners are wrong in their criticism of the Court of Appeals, but in any event the application of a well settled legal standard to particular facts does not warrant review by this Court.

The federal doctrine of *forum non conveniens* was settled by this Court's decisions in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). As this Court held in *Piper*, and as Petitioners acknowledge, *forum non conveniens* analysis is a two-step inquiry. The threshold determination for *forum non conveniens* is whether an adequate alternative forum is available to the plaintiffs. Pet. 10-11 (quoting *Piper* at 255, n.22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum")); *see also id.* 10 (adequate alternative forum is "threshold issue"); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) ("the district court must first establish that there is an adequate alternative forum"); *Pain v. United Technologies Corp.*, 637 F.2d 775, 783 (D.C. Cir. 1980) ("At the outset, both *Gilbert* and *Koster* [*v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947)] require that two alternative forums have jurisdiction over the subject matter and parties in the suit before the doctrine of *forum non conveniens* even comes into play.").

It is well-settled that if the movant does not establish the availability to plaintiffs of an adequate alternative forum, the motion to dismiss on ground of *forum non conveniens* must be denied without further analysis. *See, e.g., El-Fadl*, 75 F.3d at 677, 679 (looking only to availability of adequate alternative forum when finding district court erred in dismissing complaint on *forum non conveniens* grounds because "only if there is an adequate alternative forum must the court then weigh the relative conveniences to the parties

against the presumption of the plaintiff's forum selection") (citing *Pain*); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1169 (5th Cir. 1987) ("Since the district court correctly concluded that an alternative forum was unavailable, there was no need for it to proceed to a balancing of the private and public interest factors"), *vacated on other grounds by Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989). If, however, an adequate alternative forum exists, then the court moves to the second step of the analysis, a balancing of the relevant public and private interest factors identified in *Gilbert* to measure the convenience of the forum and of the litigants. *See Piper*, 454 U.S. at 241 (citing *Gilbert*, 330 U.S. at 508-509).

In reaching its decision, the Court of Appeals cited *Piper* and followed this well-established legal analysis. Pet. 5a–9a. In holding that the remedy offered by the Claims Commission was "so clearly inadequate or unsatisfactory that it is no remedy at all," the Court of Appeals directly applied *Piper*. Pet. 8a; *see also Piper*, 454 U.S. at 254 n.22 ("[W]here the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied").

Petitioners do not contest the legal principles applied by the Court of Appeals, but instead offer scattershot criticisms of the application of that standard to the facts of this case. While those criticisms could not justify a writ, they are in any event wholly unfounded.

First, Petitioners contend that the Court of Appeals did not "evaluat[e] the adequacy of the forum based on the circumstances of this case," Pet. 11, that it did not consider various factors, Pet. 16, and that its conclusion "is not supported by any analysis," Pet. 17. They thereby ignore the

Court's detailed examination of the Claims Commission and Eritrea's position there. *See* Pet. App. 5a-9a. Specifically, while Petitioners argue that the Court of Appeals failed to consider "the unlikelihood that Eritrea will in fact make such a setoff" and "Eritrea's express statement to the Claims Commission that awards should go to the parties sustaining the damages," Pet. 12, the Court directly addressed both points. With respect to the former point – for which Petitioners present no support – the Court determined that "[i]t is irrelevant whether the Commission currently contemplates that any awards to the respective governments will be set off by them against each other. What matters is that Eritrea and Ethiopia have that option." Pet. App. 7a. On the latter point, the Court concluded that "Ethiopia is unable to substantiate its claim that Nemariam will receive a remedy if Eritrea succeeds in prosecuting her claim before the Commission." *Id.*[1]

Second, Petitioners contend that the decision of the Court of Appeals conflicts with *Piper* because it failed to "mak[e] an analysis of the appropriateness of the dismissal under the balancing factors established by this Court in *Gilbert*," Pet. 11, and thereby effected a "*per se* disqualification" of

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[1] Petitioners also incorrectly argue that the Court of Appeals should have considered whether a condition on the dismissal might have cured the inadequacy of the Claims Commission. Pet. 16. Petitioners did not suggest such a condition below, nor do they do so here, and it is difficult to conceive of an effective condition in this case. As the Second Circuit observed, "the [conditional dismissal] mechanism is not a substitute for the initial 'justifiable belief' of adequacy. Conditions cannot transform an inadequate forum into an adequate one." *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 248 (2d Cir. 2001) (vacating dismissal and remanding because subsequent change in law upon which district court had relied in concluding that Pakistan was an adequate alternative forum rendered that determination uncertain).

interstate tribunals in violation of the "twin principles of flexibility and trial court discretion that this Court required in *Piper*," Pet. 16. That criticism ignores the well settled two-step analysis that Petitioners elsewhere accept. The Court of Appeals reversed the District Court's decision because Petitioners had failed to establish an adequate alternative forum available to Respondents. Pet. App. 8a, *citing Piper*, 454 U.S. at 254. Accordingly, pursuant to *Piper* and *Gilbert*, the Court of Appeals properly refrained from reviewing the District Court's analysis of the *Gilbert* factors: "Because we conclude that the district court abused its discretion in determining that the Commission was an adequate alternative forum we do not reach Nemariam's other arguments." Pet. App. 9a.[2]

B. The Decision Does Not Conflict with Any Other Decisions of the Courts of Appeals.

Petitioners argue that the decision of the Court of Appeals "creates a conflict among the circuits with respect to

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[2] The Court stated in *Piper* that "if central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Piper*, 454 U.S. at 249-50. It did not make that statement in the course of determining whether an adequate alternative forum existed, which was not at issue in *Piper*, but instead while discussing the public and private convenience factors of *Gilbert*, *Koster*, 330 U.S. 518 and *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549 (1946). Courts referring to *Piper*'s "flexible approach" have recognized that it applies to the second prong of the *forum non conveniens* analysis. *See, e.g., DiRienzo v. Phillip Servs. Corp.*, 294 F.3d 21, 29 (2d Cir. 2002), *cert. denied*, 537 U.S. 1028 (2002); *Iragorri v. Int'l. Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000) (citing *Piper*); *Chukwu v. Air France*, 218 F. Supp. 2d 979, 987 (N.D. Ill. 2002); *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1085 (N.D. Ill. 2002); *Doe v. Sun Int'l Hotels, Ltd.*, 20 F. Supp. 2d 1328, 1330 (S.D. Fla. 1998).

the standard for determining the adequacy of the foreign tribunal." Pet. 17. Given Petitioners' acknowledgement that the Court of Appeals applied the *Piper* standard, that argument is wrong on its face unless Petitioner could identify another Court of Appeals that has repudiated or deviated from *Piper*, which they do not even attempt. Nor can they identify a single decision that holds an alternative forum adequate even though the plaintiffs cannot personally appear in the forum, have no personal right to a remedy in the forum, and could receive no remedy even if they prevailed on their claims. The decisions they do cite for the supposed conflict do not even address the issue decided by the Court of Appeals.

First, Petitioners cite *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987). In *Union Carbide*, India had adopted a statute that gave its government the exclusive right to represent victims of the Bhopal disaster before courts anywhere. The Court of Appeals affirmed a *forum non conveniens* dismissal in favor of the Indian courts. But no party raised, and the Court of Appeals *did not decide*, whether India's exclusive representation of its nationals rendered its courts an inadequate alternative forum. Because, as the Court of Appeals observed at oral argument here, India's representation "wasn't a basis for the [Second Circuit's] decision," Transcript of Proceedings, dated Oct. 18, 2002, at 28, *Union Carbide* could hardly give rise to a conflict. In any event, the circumstances of that case would have so fundamentally distinguished any holding there that

the case could not have made for a conflict under any circumstances.[3]

Second, Petitioners cite *In re Lloyd's American Trust Fund Litigation*, 954 F. Supp. 656 (S.D.N.Y. 1997). In *Lloyd's*, the District Court rejected plaintiffs' argument that English courts would be inadequate because they had no class action mechanism by which the named plaintiffs could represent others with similar claims, pointing out that the English courts had "other procedural mechanisms" that would serve the purpose. 954 F. Supp. at 673. However, the Court of Appeals did not rest its decision here on Respondents' inability to represent *others* before the Commission, but on the absence of any right to obtain a remedy for *themselves*.

Third, Petitioners cite *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002), *cert denied*, 123 S. Ct. 1928 (May 5, 2003), in which the Court of Appeals upheld a dismissal

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[3] In *Union Carbide*, plaintiffs challenged the adequacy of the Indian courts only on the grounds that they lacked a class action mechanism and other procedures. 809 F.2d at 198-199. All but a few of the 200,000 plaintiffs were Indian citizens living in India who had revoked their authorizations for American counsel *and chosen to have the government of India represent them. Id.* at 202. The government of India had entered the case as a plaintiff on behalf of all victims of the disaster, "with retainers executed by many of the victims," *id.* at 197-98, and at the time of the appeal no longer opposed the motion to dismiss. *Id.* Moreover, the Bhopal Act granted each claimant a limited right to participate in the proceedings and to have "a legal practitioner of his choice [and at his expense] to be associated in the conduct of any suit or other proceeding relating to his claim." *Bi v. Union Carbide Chemicals and Plastics Co., Inc.*, 984 F.2d 582, 585 (2d Cir. 1993). Finally, far from asserting the right to represent all claimants in all fora, Eritrea here, unlike India in *Union Carbide*, has expressly acted to permit this action to go forward without its involvement.

on the ground of *forum non conveniens* in favor of the Mexican courts. In *Gonzalez*, the plaintiff could have pursued a case directly in Mexico, but under Mexican law the potential remedy was severely limited. The Fifth Circuit held that the Mexican court was adequate because it would provide the plaintiff a remedy, even if *de minimis*, and "the adequacy inquiry under *Piper Aircraft* does not include an evaluation of whether it makes economic sense for Gonzalez to file this lawsuit in Mexico." *Id.* at 383.

The Court of Appeals, however, expressly distinguished *Gonzalez*, without questioning its holding or analysis in any way. The Court recognized, in accord with *Gonzalez*, that "a more limited recovery than is available in plaintiffs' forum of choice does not automatically make the alternative forum inadequate." Pet. App. 8a.[4] It pointed out, however, that "[i]n this case, Ethiopia cannot assure Nemariam of recovering any award at all, even if the Commission upholds her claim in full." Pet. App. 8a. Hence, the Court of Appeals concluded, "we fail to see how an alternative forum in which the plaintiff can recover nothing for a valid claim may also be deemed adequate." Pet. App. 8a.

Finally, Petitioners cite a series of decisions for the unremarkable proposition that a *forum non conveniens*

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[4] *See also Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001) (New Zealand administrative law system offered adequate alternative forum although the amount plaintiffs would recover was significant less than in U.S. courts); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768-69 (9th Cir. 1991) (lesser recovery does not render forum inadequate); *de Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (lesser recovery does not render forum inadequate); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980) (*en banc*) ("the prospect of a lesser recovery does not justify refusing to dismiss on the ground of *forum non conveniens*").

dismissal may be appropriate "even when the alternative forum does not provide the same procedural guarantees as a U.S. court." Pet. 19. The Court of Appeals did not discuss either the proposition or the cases reflecting it, however, for the simple reason that they are wholly irrelevant to the issue it decided.[5] Respondents' challenge to the adequacy of the Claims Commission was not based on mere procedural differences between the fora, but on the undisputed fact that "the Commission cannot award any relief directly to" the Respondents. Pet. App. 6a. A right to a remedy is not a procedural nicety.

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[5] In each of the cases, plaintiffs had direct access to the alternative forum and a right to receive directly any relief awarded. *See Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606-07 (10th Cir. 1998) (plaintiff could bring action against defendants in French courts); *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1234-35 (2d Cir. 1996) (plaintiffs could bring claims in English courts); *Lueck*, 236 F.3d at 1144 (9th Cir. 2001) ("plaintiffs . . . can file and have claims filed with" New Zealand no-fault accident compensation scheme for remedy); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 540 (S.D.N.Y. 2001) (Ecuadorian law "expressly provides that persons injured . . . may sue in Ecuadorian courts"), *modified and aff'd*, 303 F.3d 470 (2d Cir. 2002); *Jeha v. Arabian American Oil Co.*, 751 F. Supp. 122, 125-126 (S.D. Tex. 1990) (claim "[could] be filed [in Saudi Arabian courts] either by an attorney for the claimant or by the claimant *pro se*"), *aff'd without opinion*, 936 F.2d 569 (5th Cir. 1991). Petitioners miscite *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147. Pet. 19. There, the Fifth Circuit held that dismissal for *forum non conveniens* was not appropriate because the alternative forum did not have jurisdiction over the United States as a defendant. Petitioners also omit from their quotation from that case the one phrase relevant to the decision here. *Compare* Pet. 19 *with* 821 F.2d at 1165 ("A foreign forum is adequate *when the parties will not be deprived of all remedies or treated unfairly*, even though they may not enjoy the same benefits as they might receive in an American court.") (omitted passage in italics).

II. THE DECISION OF THE COURT OF APPEALS DOES NOT EFFECT A "*PER SE* DISQUALIFICATION OF STATE-TO-STATE ARBITRAL TRIBUNALS PREMISED ON STATE ESPOUSAL" OR PRESENT ANY CONFLICT WITH POLICIES OR DECISIONS REGARDING SUCH TRIBUNALS.

A. The Decision Has No Effect on Tribunals Premised on State Espousal of Nationals' Claims.

Given a *holding* that reflects a conventional application of settled *forum non conveniens* principles to particular facts, Petitioners argue that "the *effect* of the ruling below is to impose a *per se* disqualification of . . . state-to-state arbitral tribunals [based on state espousal] as alternative forums in a *forum non conveniens* analysis." Pet. 12 (emphasis added); *see also* Pet. 21-23; Pet. 23 (decision below "gratuitously undermines the authority and credibility of the Claims Commission"); Pet. 24 (decision below "inevitably calls into question the validity of state-to-state tribunals for the resolution of" international claims). The decision announced no such "*per se* disqualification," and Petitioners' faulty prediction provides no basis for a grant of certiorari.

First, the holding and analysis of the Court of Appeals would be irrelevant to any tribunal in which nationals of one state could pursue directly their claims against another state. As even Petitioners concede, states "can" establish fora "in which private parties are permitted to pursue their own claims." Pet. 13 n.7. In fact, states regularly do. "For example, the Algiers Accords establishing the Iran-United States Claims Tribunal made such a provision for private claims in excess of $250,000." Pet. 13 n.7; *see also* Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 223,

224 (creating Iran-United States Claims Tribunal) (the "Algiers Accords"). Private claimants before the Iran-U.S. Claims Tribunal thus have the precise rights and protections that the Court of Appeals in this case found lacking in the Claims Commission.

The Iran-U.S. Claims Tribunal is by no means unique in this respect. Chapter 11 of the North American Free Trade Agreement among the United States, Canada, and Mexico permits nationals of one of those states to pursue claims against another of those states arising from investments in that state. *See* North American Free Trade Agreement, Dec. 17, 1992, arts. 1115-20, 32 I.L.M. 296 & 32 I.L.M. 605, 642-43. Similarly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, established the International Centre for Settlement of Investment Disputes as a mechanism by which States could agree that they would arbitrate investment claims directly with foreign investors. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 25(1), 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 174. For a final example, in the last half-century, the United States and many other nations throughout the world have entered into literally thousands of bilateral investment treaties, or BITs, which almost uniformly provide for direct investor-State arbitration to resolve investment claims. *See Dispute Settlement: Investor-State*, U.N. Conference on Trade and Development, at 41, U.N. Doc. UNCTAD/ITE/IIT/30 (2003), *available at* http://www.unctad.org/en/docs//iteiit30_en.pdf (noting that 2,099 BITs had been concluded as of January 1, 2002). By its terms, the decision of the Court of Appeals would provide no support to a plaintiff in a United States court defending against a motion to dismiss on *forum non conveniens* grounds in favor of an international tribunal in which that plaintiff could bring his or her own claims.

Second, the decision of the Court of Appeals has no effect on the ability of states to establish international fora in which the states espouse their nationals' claims to the exclusion of direct claims by those nationals in other fora. The Court of Appeals did not address principles of state espousal generally, and it did not rest its holding on any general view of the adequacy of interstate tribunals to resolve international claims by state espousal. To the contrary, it rendered its decision in the unique context of Article 5(8) of the Agreement, in which the States Party established an interstate claims commission in which they may espouse their nationals' claims, but at the same time, by Article 5(8), expressly provided that certain claimants could also proceed with their claims directly against the defendant state in a national court. Pet. App. 31a (Commission "sole forum" except for claims "filed in another forum prior to the effective date of [the] Agreement").

Given the circumstances created by Article 5(8), the Court of Appeals had no occasion to address a situation in which the States Party had not provided for the concurrent jurisdiction of a national court. Specifically, the decision nowhere suggests that where, unlike Eritrea and Ethiopia, states have agreed that nationals' claims would be heard exclusively by state espousal before an international tribunal, a U.S. court would still permit a national to proceed outside that tribunal. The Court of Appeals did not address that issue for the simple reason that, in light of Article 5(8), the issue could not arise. Petitioners implicitly recognize that fatal flaw in their "per se disqualification" argument by failing in their Petition to so much as mention Article 5(8), Ethiopia's agreement there that the Claims Commission would not be the exclusive forum for Respondents' claims, or the import of Ethiopia's agreement to Article 5(8) for the central argument of the Petition.

Hence, far from "disqualifying *per se*" interstate fora based on state espousal, the decision of the Court of Appeals stands for a much more carefully defined – and plainly correct – proposition: where a respondent state has agreed that certain claims against it, which are within the jurisdiction of an interstate claims commission operating by state espousal, may also go forward in a U.S. court, that state cannot defeat the right of a plaintiff to proceed in the U.S. court by arguing on a *forum non conveniens* motion that the commission, in which the plaintiff cannot appear and from which the plaintiff has no right to a remedy, constitutes an adequate alternative forum.

Finally, because in the realm of interstate claims commissions, the carve-out of Article 5(8) is unique, and concurrent jurisdiction itself is exceedingly rare, if not unique, the decision of the Court of Appeals could not possibly have the impact Petitioners attempt to conjure. In every example provided by Petitioners, the interstate claims commission established by interstate argument, unlike the Claims Commission here, was to have *exclusive* jurisdiction over the claims it was authorized to resolve. Pet. 15; *see, e.g.*, United States-Mexico General Claims Convention, T.S. 678, Arts. I, VIII (Sept. 8, 1923) (creating Commission to resolve United States-Mexico claims and barring claims not brought before that Commission); Chilean-U.S. Claims Commission of 1892 Convention for the Settlement of Claims, Aug. 7, 1892, U.S.-Chile, art. I, T.S. 42 (creating Claims Commission for "[a]ll claims" between the United States and Chile). In other words, the States Party agreed that claims against a respondent state could not proceed outside the exclusive forum, including in a national court.

Needless to say, the predicate of a *forum non conveniens* motion is the plaintiff's right otherwise to proceed in the chosen forum. Hence, before reaching any *forum non*

conveniens application, a U.S. court faced with a plaintiff whose state had agreed that some other forum would have exclusive jurisdiction over the claim would first have to hold that that agreement did not bind the plaintiff. Yet Petitioners cite not a single case in which a U.S. court allowed a claimant to proceed against a defendant state when the claimant's state had agreed with the defendant state to give exclusive jurisdiction over claims against that state to another forum.

The authority Petitioners do cite, albeit for other purposes, would provide no support for such a holding. "The United States has itself on numerous occasions as part of the settlement of disputes with foreign nations required that the claims of United States citizens to [sic] be prosecuted *only* through governmental espousal before a tribunal established for the purpose." Pet. 14 (emphasis added). In *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (cited at Pet. 14, 15-16, 21-22, 23-24, 25), this Court upheld the President's authority to suspend claims against Iran by U.S. nationals in U.S. courts and require that they be brought instead before the Iran-United States Claims Tribunal in accordance with the President's executive agreement with the government of Iran, which established that Tribunal as the exclusive forum for the claims. Similarly, in *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed Cir. 1997) (cited at Pet. 15-16, 22-23), the Federal Circuit affirmed the dismissal of actions by U.S. nationals seeking additional recovery from the United States after the President, implementing the Algiers Accords, settled a class of claims against Iran then pending before the Tribunal. *See also Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984) (affirming dismissal of claims by Mexican nationals against Mexico for compensation received by Mexico in settlement of claims against the United States).

In short, Petitioners can establish no impact from the decision because (a) the carve-out provision recognizing concurrent jurisdiction, which makes possible a *forum non conveniens* issue, is rare, if not unique to the Eritrea-Ethiopia Agreement, and (b) in the rare circumstances in which U.S. courts have had to address the issue, they have given no indication that they would permit claims against respondent states to go forward where the claimant's state has instead agreed to grant exclusive jurisdiction over the claims to an international claims commission. Petitioners provide final and conclusive proof of the *sui generis* character of the question presented by failing to identify a *single* decision in which any court has *ever* dismissed a case on *forum non conveniens* grounds in favor of an international claims tribunal, or, indeed, any other decision in which a court has even had to address the issue. In other words, on Petitioners' own terms, the decision will have no impact whatsoever.

B. The Decision Does Not Conflict with U.S. Policy or Other Decisions Regarding Interstate Dispute Resolution, Arbitration or Foreign Claims.

Petitioners argue finally that the decision of the Court of Appeals conflicts with U.S. policy in favor of interstate dispute resolution, U.S. policy in favor of arbitration and an alleged U.S. policy against permitting the settlement of "foreign" claims in U.S. courts. Pet. 23-29. Conflicts defined in such amorphous terms are not the stuff of which grants are made, but in any event the decision does not so conflict.

First, far from conflicting with any U.S. policy favoring the establishment of claims commissions to settle interstate disputes, the decision below *advances* the U.S. express interest in the settlement of the Ethiopia-Eritrea conflict. The United States helped negotiate the Agreement, and the

State Department played a central role in negotiating the carve-out in Article 5(8) that recognized the U.S. courts' concurrent jurisdiction over Respondents' claims. Resp. App. 3a-4a, 7a-8a. The Court of Appeals simply ensured that the District Court would exercise the jurisdiction that the States Party recognized.

The decision also poses no conflict with *Dames & Moore* or *Abrahim-Youri*, neither of which even involved *forum non conveniens*. Pet. 21-23. In *Dames & Moore*, this Court did not do anything so ill-defined as to "uphold the use of such a [state espousal] tribunal." Pet. 21. To the contrary, there "this Court upheld the President's suspension of U.S. nationals' lawsuits against Iran and the requirement that their claims be brought instead before the Iran-United States Claims Tribunal, in accordance with the President's agreement with the government of Iran." Pet. 15; *see Dames & Moore*, 453 U.S. at 688 (holding that the President was authorized to bar domestic litigation pursuant to the Algiers Accords with Iran). In *Abrahim-Youri*, 139 F.3d at 1466, the Court held that U.S. extinguishment of certain claims of U.S. nationals in a 1990 lump-sum settlement with Iran as part of the exclusive dispute resolution procedures established by the Algiers Accords was not an unconstitutional taking. The decision of the Court of Appeals cannot create a conflict with decisions that do not even deal with the same subject matter.

Second, Petitioners contend that the decision conflicts with U.S. policy "favor[ing] the resolution of disputes by arbitral tribunals." Pet. 26. Petitioners forget that "[t]he 'liberal federal policy favoring arbitration agreements' manifested by [the Federal Arbitration Act] is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (internal citation

omitted). U.S. policy and U.S. law do not "mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Ethiopia agreed in Article 5(8) that this case could go forward outside the Commission, and it hardly conflicts with U.S. arbitration policy to give effect to that agreement.

Finally, Petitioners suggest that there is some U.S. policy against hearing foreign claims in U.S. courts pursuant to the FSIA. Pet. 29. The only U.S. policy about hearing claims under the FSIA is reflected in the provisions of the FSIA itself, but the District Court has not even reached Petitioners' motion to dismiss for lack of subject matter jurisdiction under that statute. The decision cannot create a conflict on the policy or interpretation of a statute it does not address. Similarly, the views of the United States expressed as *amicus curiae* in the rehearing of *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001), *reh'g en banc granted*, -- F.3d --, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (quoted at Pet. 28-29), which have not been adopted by any court, addressed the Alien Tort Claims Act, on which Respondents do not base any claim. In any event, any concern about the manufacture of causes of action to allow foreign tort claims to be heard in the United States would not apply to this FSIA takings action, where the cause of action is specified in the statute and well established in law. *See* 28 U.S.C. 1605(a)(3); *see also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-12 (9th Cir. 1992) (stating established standards for the international takings claim specified in FSIA).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC
P.O. Box 208215
New Haven, CT 06520
James Silk

Gregory H. Fox
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 West Palmer
Room 3377
Detroit, MI 48202

Noah Novogrodsky
UNIVERSITY OF TORONTO,
FACULTY OF LAW
78 Queen's Park
Toronto, Ontario
Canada M5S 2C5

Donald Francis Donovan
Counsel of Record
Michael M. Ostrove
Katherine Birmingham
Wilmore
Caroline H. Luckenbach
Robert William Yalen
David M. Bigge
Jessica Bannon Vanto
Matthew M. Riccardi
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, NY 10022
(212) 909-6000

Counsel for Respondents

Dated: August 25, 2003

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 00-CV—1392-TPJ

HIWOT NEMARIAM, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

and

THE COMMERCIAL BANK OF ETHIOPIA

Defendants.

DECLARATION OF O. THOMAS JOHNSON, JR.

O. Thomas Johnson, Jr. declares pursuant to 28 U.S.C. § 1746:

1. My full, true and correct name is Oliver Thomas Johnson, Jr. I am a citizen of the United States of America and an attorney admitted to practice law in the State of California and the District of Columbia.

2. I make this declaration at the request of counsel for Plaintiffs in the above-captioned case. I have been asked to provide facts within my personal knowledge regarding the Claims Commission established by Ethiopia and Eritrea through their December 12, 2000, Peace Agreement.

3. I am currently a member of the law firm of Covington & Burling in the District of Columbia, where I specialize in international litigation and arbitration.

Covington & Burling's Role with the Claims Commission

4. Since September 2000, I have been retained by Eritrea to act as their legal counsel in specific matters concerning the Boundary Commission created by Ethiopia and Eritrea as part of the Peace Agreement.

5. I also have played a very circumscribed role in advising Eritrea on the Claims Commission created by the Peace Agreement. My only work in this regard thus far has been to review documents drafted by Lea Brilmayer, Legal Advisor to the Office of the President, to assist Eritrea in locating, and acting as an intermediary with, potential expert witnesses, and to appear at hearings.

6. Covington & Burling currently plays and will continue to play a circumscribed role in the Claims Commissions process. At present, we expect that we will not draft any documents, nor will we participate in fact-gathering, investigation or preparation of the thousands of claims that Eritrea will submit to the Commission. We expect our role

will be limited to arguing procedural issues in the July 1-3 hearings and possible argument in later hearings.

7. I am the only partner at Covington & Burling who has assisted Eritrea with Claims Commission issues. I estimate that I have billed less than fifty hours to this case. Except for approximately five hours of work performed by one associate, I have not assigned any work related to the Claims Commission to any associates, nor do I expect to assign any other attorneys to the case in the future.

8. I have spent approximately fifteen hours in hearings concerning the Claims Commission. However, I have never flown to The Hague or to other locations specifically to appear at such hearings; I have always traveled to the relevant location for other business meetings that were timed to coincide with Claims Commission hearings.

Negotiation of the Claims Commission

9. I attended one round of negotiations on behalf of Eritrea relating to the drafting of the Peace Agreement. I was not Eritrea's point person for negotiation of the Peace Agreement; however, based on the negotiations that I attended and on subsequent discussions, I understand that the Claims Commission is meant to be a claims forum that may run parallel to any proceedings already filed in other fora.

10. In October or November 2000, I discussed with Lea Brilmayer and Kathleen Wilson, from the U.S. Department of State, Eritrea's position that pre-existing lawsuits

should be able to proceed parallel to the Claims Commission. Based on these discussions, I understood that Eritrea's position on this issue was motivated by Eritrea's desire not to interfere with the *Hiwot Nemariam, et al. v. Ethiopia and the Commercial Bank of Ethiopia* case in the United States. Following these discussions, the State Department produced a draft of the Peace Agreement that reflected Eritrea's position. The substance of the provision that appeared in the State Department draft is in the Peace Agreement as signed by the parties.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 7, 2001
Washington, D.C.

/s/
O. Thomas Johnson, Jr.
Covington & Burling

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 00-CV—1392-TPJ

HIWOT NEMARIAM, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

and

THE COMMERCIAL BANK OF ETHIOPIA

Defendants.

DECLARATION OF LEA BRILMAYER

Lea Brilmayer declares pursuant to 28 U.S.C. §1746:

1. My full, true and correct name is Roberta Marie ("Lea") Brilmayer. I am a citizen of the United States of America and an attorney admitted to practice law in the State of Texas and before the United States Supreme Court.

2. I make this declaration at the request of counsel for Plaintiffs. I have been asked to provide facts within my personal knowledge regarding the Claims Commission established by Ethiopia and Eritrea.

3. I graduated from the Boalt Hall School of Law at the University of California at Berkeley with a Juris Doctor degree in 1976, and I received an LL.M. from Columbia Law School in 1978.

4. Between 1976 and 1982, I taught at the Columbia Law School, the University of Texas Law School, and the University of Chicago Law School. From 1982 to 1991, I was a Professor at the Yale Law School. From 1991 to 1997, I was a Professor at New York University Law School. In 1998, I returned to the Yale Law School as the Howard M. Holtzmann Professor of International Law.

5. Since January 2000, I have advised the Office of the President of the State of Eritrea. From 1993 through January 2000, I acted as the Co-Agent for the Government of Eritrea for the Eritrea-Yemen Arbitration (territorial and maritime phases), which was held under the auspices of the Permanent Court of Arbitration at the Peace Palace, The Hague, Netherlands.

6. In my official capacity as Legal Advisor, I was involved in the negotiations of the December 12, 2000, Comprehensive Peace Agreement ("Agreement") between Ethiopia and Eritrea. I attended negotiating sessions as a representative of Eritrea and advised the government

generally, outside the negotiating sessions, about negotiating proposals that had been put forth.

7. The official negotiations over the Agreement commenced within two weeks of the signing of the Cessation of Hostilities Agreement between Ethiopia and Eritrea in June 2000. However, negotiations over the Claims Commission or a similar body had occurred sporadically throughout the conflict between Ethiopia and Eritrea.

Peace Agreement Negotiations and Interpretation

8. During the negotiations over the Agreement and the Claims Commission, both Ethiopia and Eritrea were fully aware that the case of *Hiwot Nemariam, et al. v. The Federal Democratic Republic of Ethiopia and the Commercial Bank of Ethiopia* had been filed in the District Court of the District of Columbia.

9. During the negotiations, it was Eritrea's position that the Claims Commission should not interfere with proceedings in the *Hiwot Nemariam* case. Before the signing of the agreement on December 12, 2001, Ethiopia's agreement to this position was obtained. Ethiopia's acceptance of Eritrea's position on this issue was incorporated as Article 5, Paragraph 8 of the Agreement, which states, "Except for claims . . . filed in another forum prior to [December 12, 2000], the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this article[.]"

10. Eritrea expressly requested that this language be included in the Agreement to prevent the existence of the Claims Commission from affecting the *Hiwot Nemariam* case. This provision was added after I personally informed a State Department negotiator at a meeting in Asmara, Eritrea, in late November 2000 that Eritrea could not sign an agreement that would potentially adversely affect the rights of persons of Eritrean national origin in an on-going case. It was my strongly held view (on consultation with my supervisors in the Office of the President) that the plaintiffs in the *Hiwot Nemariam* case should not be required to relinquish their legal rights in an ongoing case as a condition of Eritrea obtaining a peace settlement and boundary demarcation with Ethiopia. Upon my insistence, the State Department negotiator suggested the wording that ultimately appeared in the Agreement.

11. As this provision was based on negotiation and understanding between Eritrea and Ethiopia, it is my opinion and Eritrea's official position that Ethiopia's request for dismissal of the *Hiwot Nemariam* case on *forum non conveniens* grounds in favor of the Claims Commission is inconsistent with the agreement reached by Eritrea and Ethiopia, which is reflected in the Agreement.

Claims to be Filed by Eritrea Before the Claims Commission

12. Currently, the Claims Commission is not operating, its rules and procedures have not been finalized and no claims have been filed yet. However, Eritrea's plans for presenting claims to the Commission are as follows.

13. Eritrea is currently preparing to present approximately 150,000 claims before the Claims Commission. However, if Eritrea and Ethiopia's request to include claims of Internally Displaced Persons ("IDPs") is granted, the group of claims presented by Eritrea will increase to over one million.

14. Eritrea will present approximately ten thousand claims resulting from violations of international human rights law, including:

- Torture of civilians;
- Discrimination on the basis of ethnicity or national origin;
- Arbitrary and illegal detention of civilians.

15. Eritrea also will make over one thousand claims concerning Ethiopia's violations of the laws of armed conflict, including:

- Illegal internment of civilians in concentration camps without formal accusation or trial;
- Torture and physical maltreatment of illegally interned civilians;
- Abuse of Eritrean civilians;

- Bombing in violation of a United States brokered air moratorium;

- Deliberate targeting of civilian property and infrastructure in Asmara and Assab in shelling and bombing.

16. Eritrea will submit an unknown but very large number of claims based on violation of laws regarding military occupation, including over ten thousand claims of:

- Systematic physical and sexual abuse of civilians in occupied Eritrean territory;

- Devastation of infrastructure;

- Deliberate destruction of property.

17. Eritrea further will offer claims concerning violations of the OAU Framework Agreement and the Algiers Agreements, including:

- Death and injury to persons and livestock due to Ethiopia's refusal to comply with United Nations de-mining operations;

- Obstruction of the return of Eritrean civilians to their homes;

- The illegal continuing occupation of demilitarized zones.

18. Eritrea also will submit claims regarding violations of international customary law and treaties, including:

- Ethiopia's abduction of Eritrean consular officials engaged in the performance of consular duties on protected diplomatic property;

- Ethiopia's illegal entrance into and forcible seizure and ransacking of the Eritrean Embassy Residence in Addis Ababa;

- Ethiopia's continued physical occupation of the Residence.

19. Eritrea will make claims based on international laws of contract and property, including:

- Ethiopia's systematic suspension of payments and/ or failure to make payments in accordance with outstanding legal obligations;

- The blockage of access to the Port of Assab from both land and sea;

- The diversion of international commerce directed to Assab.

20. The types of injuries for which Eritrea will request relief before the Claims Commission include:

- Deliberate infliction of bodily injury, including mutilation of children, assault, and systematic rape

(including gang rape) in areas occupied by the Ethiopian military;

- Deaths, kidnappings, and disappearances in areas occupied by the Ethiopian military;

- Systematic separation of families, with an intent to inflict psychological harm on children and parents;

- Discrimination against persons still residing in Ethiopia by reason of their Eritrean national or ethnic origin;

- Deliberate destruction and desecration of houses of religious worship, cemeteries, and archaeological and cultural sites;

- Deliberate sabotage and destruction of infrastructure.

21. Despite the overwhelming importance and scope of the claims described above, Eritrea has also stated its intention to pursue the claims of individuals expelled and denationalized by Ethiopia, as well as claims of taking of property, requesting financial compensation and other relief.

22. The class of individuals potentially represented in the *Hiwot Nemariam* case is only a subsection of the claimants represented by Eritrea before the Claims Commission. Nevertheless, by ensuring that this significant number of similarly situated claimants have full access to justice, the *Hiwot Nemariam* case will assist Eritrea in its

Herculean task of representing its 150,000 to potentially more than one million claimants.

23. Further, as Ethiopia stated in its May 1, 2001, submission to the Claims Commission, the Agreement does not preclude a party who has submitted a claim to another forum prior to December 12, 2000, from submitting the same claim to the Commission. *See* Ethiopia's May 1, 2001, Submission to the Claims Commission at ¶ 3.16, attached hereto as Exhibit 1 ("Ethiopia's May 1 Submission"). Therefore the *Hiwot Nemariam* lawsuit does not preclude Eritrea from submitting the same claims to the Commission. As both States Parties are following the *Hiwot Nemariam* case, it will be possible to ensure that no member of the *Hiwot Nemariam* class receives double compensation through the Claims Commission.

Ethiopia's Procedural Demands

24. In its May 1, 2001, submission to the Claims Commission, Ethiopia has recommended procedural rules that would severely exacerbate the challenges faced by Eritrea in representing this enormous class of individuals. First, Ethiopia alleges that the Agreement does not provide the Commission with the power to enforce discovery orders or indeed to issue any interim orders. Further, because, in Ethiopia's view, there should be no need for discovery, Ethiopia also is insisting that all parties should be required to submit all supporting evidence by the December 1, 2001, deadline. *See* Ethiopia's May 1 Submission at ¶¶ 3.19 to 3.21.

25. If, as Ethiopia argues, the Commission lacks discovery powers, Eritrea will face great difficulty in presenting many claims. Ethiopia systematically confiscated documents relating to the claims of numerous persons of Eritrean citizenship or national origin. Accordingly, Ethiopia has sole custody and control over documentation that is crucial to the claims of these expellees and deportees. If Eritrea is unable to compel production of such documents, it will be at a tremendous disadvantage in bringing these claims.

26. Second, Article 5, Paragraph 8 of the Agreement states that, "[a]ll claims submitted to the Commission shall be filed no later than one year from the effective date of this Agreement." Ethiopia asserts that this December 12, 2001 deadline for filing claims should be strictly enforced. *See* Ethiopia's May 1 Submission at ¶ 2.3.

27. Ethiopia asserts that all of these determinations must be made prior to the December 12, 2001, deadline, and that all claims and supporting evidence must be submitted by this deadline. As Eritrea appears to have many times the number of potential claims as Ethiopia, these positions disadvantage Eritrea significantly and will only increase the likelihood that many Eritrean claims will never be heard.

Eritrea Has Limited Resources

28. Eritrea, as one of the world's poorest countries has severely limited resources to devote to the Claims Commission. Although O. Thomas Johnson, a member of the firm Covington & Burling, has assisted and will continue to assist Eritrea with its presentations before the Boundary

Commission and the Claims Commission, Covington & Burling will not be preparing claims to be presented before the Claims Commission for the simple reason that the firm is charging market law firm rates, and Eritrea cannot afford to hire the firm to play an extensive role in this process.

29. Accordingly, the enormous task of representing 150,000 to one million claimants before the Claims Commission will fall to my deputy, Megan Munzert and me. As I am also Co-Agent for the State of Eritrea before the Border Commission, the time that I can spend on the Claims Commission is very severely limited.

30. Further, I must return to Yale Law School in August 2001. I will spend as much time as possible on the Claims Commission cases, but will need, of course, to devote significant time to my teaching responsibilities. In addition, I will retain my responsibilities with regards to the Border Commission.

31. The Office of the Legal Advisor currently has one full time researcher working in the office on the filing and processing of claims. We are hoping to hire approximately ten to fifteen entry-level Eritrean assistants and to train them to interview potential claimants. These individuals will not have a legal background, but rather will be chosen primarily for their language expertise. Financial support for these assistants has not yet been obtained. In addition, when it is possible, our office solicits volunteer assistants from American law schools. However, at this point, it is expected that there will be no other lawyers, Foreign Ministry

assistance or investigators devoted to the preparation of claims to be presented before the Claims Commission.

32. Further, Eritrea has not yet initiated any procedures by which to notify, identify or interview claimants who are residents or nationals of other states or otherwise are living outside of Eritrea or Ethiopia. Many people deported or expelled from Ethiopia resettled in the United States or elsewhere, rather than settling in Eritrea.

Individual Human Rights Claims Will Take Priority

33. Given the enormous number of fundamental human rights violations to be presented before the Claims Commission, while Eritrea intends to pursue all existing individual claims, claims of purely financial injuries, including the taking of property, will be given less emphasis.

34. Eritrea will award highest priority to the presentation of claims of victims of the conflict who are left with so few resources that they are unable to provide for their own sustenance and housing. Our immediate focus will be on individuals whose lives have been disrupted and whose physical security is currently in jeopardy. This includes people living in occupied territories whose lives have been devastated by the war, as well as deportees and expellees.

35. Approximately one million people are currently homeless and in great distress in Eritrea, including those whose homes have been looted or bombed and people living in agricultural areas who are unable to plant crops. Most of these individuals currently reside in temporary camps created

for IDPs while they wait for the security situation to stabilize so that they may return to their farms and villages. Eritrea will prioritize the provision of homes and sustenance to these people whose needs are extremely urgent.

36. Eritrea also will give high priority to the claims of thousands of victims of rape, sexual assault and other forms of physical abuse. In particular, Eritrean women and young girls who have been impregnated by their rapists and/or suffer from venereal disease because of rape require urgent remedies including medical attention for themselves and their babies.

37. Thus, while Eritrea will do its utmost to present all valid claims to the Claims Commission, the *Hiwot Nemariam* lawsuit on behalf of a subset of the cases that Eritrea will present, enables us to devote more of our attention to the many other pressing claims that we have before us.

38. Moreover, the *Hiwot Nemariam* case could be of great assistance to the Claims Commission by finding facts relevant to the claims presented before the Commission. Further, it also increases the incentive for Ethiopia to provide full and rapid compensation for such claims, which is likely to be more appealing to Ethiopia than a high-profile lawsuit that would scrutinize and publicize its numerous human rights violations.

39. Eritrea welcomes the opportunity to have an international law firm with the skills and resources of Debevoise & Plimpton representing a subset of possible claims. It is Eritrea's official position that the *Hiwot Nemariam* case is important and should proceed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 7, 2001
Asmara, Eritrea

/s/
Roberta (Lea) Brilmayer
Legal Advisor to the Office of the President
State of Eritrea

[OMITTED Exhibit 1: Ethiopia's May 1, 2001, Submission to the Claims Commission.]

Supreme Court, U.S.
FILED
SEP 4 2003
OFFICE OF THE CLERK

No. 03-106

In The

Supreme Court of the United States

The Federal Democratic Republic of Ethiopia
and The Commercial Bank of Ethiopia,
Petitioners,

v.

Hiwot Nemariam; Belay Redda; Sertzu Gebremeskel; Mebrahtu Gebremedhin; Fekadu Andemeskal; and Mebrat Gebreamlak, widow and personal representative of the estate of Tedros Asfaha,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM

W. DEVIER PIERSON
Counsel of Record
KNOX BEMIS
ERICA L. SALMON
PIPER RUDNICK LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

Attorneys for Petitioners

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REPLY MEMORANDUM

Respondents' Brief in Opposition ("Opp.") does not refute the compelling reasons that support a grant of certiorari in this case. Contrary to Respondents' assertion (Opp. 16), the decision below does impose *per se* disqualification of arbitral tribunals in which individual claims are espoused by the claimant's state, and it violates the principles set forth by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The D.C. Circuit's ruling cannot be reconciled with *Piper* or with other court of appeals decisions on the adequacy of foreign forums.

Moreover, Respondents fail to refute Petitioners' showing that the ruling of the court below is in conflict with the decisions of this Court and other courts of appeal that have accepted the use of the espousal procedure as applied to U.S. nationals, *e.g., Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997). If permitted to stand, the decision will not only constrict the availability of the doctrine of *forum non* conveniens to protect the U.S. courts against lawsuits that should be handled in other forums, but will also threaten the use of the espousal procedure in state-to-state tribunals and in other contexts where it is commonly used, such as the settlement of private claims against foreign sovereigns.

1. Respondents' contention that the court of appeals decision was a "Routine Application of *Piper*" (Opp. 7 (Section I.A.)) is difficult to take seriously. The D.C. Circuit took the unprecedented step of excluding from the application of the *forum non conveniens* doctrine an entire category of potential alternative forums, i.e., international arbitral tribunals in which claims are espoused by the state on behalf of individual claimants. This blanket disqualification cannot be reconciled with the standard set

forth by this Court in *Piper* and applied by numerous courts implementing the *Piper* doctrine.[1]

Petitioners do not, as Respondents suggest (Opp. 7-8), "merely quibble with the application of a legal standard that they concede was both relevant and correctly stated." Flexibility and a consideration of the facts of each case are at the heart of the *forum non conveniens* doctrine set forth in *Piper*.[2] Petition for Writ of Certiorari ("Pet.") 9-10, 16-17. In making the inquiry pursuant to *Piper's* admonition that any alternate forum will be inadequate only in "rare circumstances" (454 U.S. at 255, n. 22), the court of appeals made no effort to determine if the facts before it gave rise to those rare circumstances that would short-circuit a determination of which forum was preferable under the public and private factors set forth in *Gilbert*. Instead, the D.C. Circuit took the position that, because the claims had been espoused and were now controlled by the state, the

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[1] Respondents' argument (Opp. 8-9) that the court of appeals correctly made the two-step analysis mandated by *Piper* is a straw-man argument inasmuch as it is the manner – not the sequence – in which the inquiry was made that clashes with *Piper*.

[2] Respondents suggest (Opp. 11, n. 2) that *Piper* requires flexibility only with respect to application of the *Gilbert* factors. However, *Piper* describes flexibility as an attribute of the *forum non conveniens* doctrine as a whole, not of the *Gilbert* factors alone. ("The Court of Appeals' decision is inconsistent with this Court's earlier *forum non conveniens* decisions in another respect. Those decisions have repeatedly emphasized the need to retain flexibility." 454 U.S. at 249.) Respondents submit there is no ambiguity on this point or other aspects of the adequate alternative forum test, but, if there were, the appropriate course would be for this Court to clarify the matter. This Court has had no occasion to provide guidance on the application of the *forum non conveniens* doctrine in the more than twenty years since *Piper*.

forum was not available a matter of law and without regard to other facts of the case.

2. The approach of the court below in disqualifying the espousal procedure eliminates any role for the exercise of the trial court's discretion. In this respect also the decision below is in conflict with *Piper* which makes it clear that "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court," and that the court of appeals may not "substitute[] its own judgment for that of the District Court." 454 U.S. at 257. Here, for example, there was evidence that Eritrea would follow the ordinary practice (*Restatement (Third) of the Foreign Relations Law of the United States* § 902, Cmt. i (1987)) and pay over to the private claimants the proceeds of any awards or settlements. This was supported not only by Eritrea's statements to the Commission (App. 7a) but by the terms in which Eritrea asserted the claims to the Commission, i.e., Eritrea seeks the awards "on behalf of" the individual claimants (App. 76a). There was no reason to doubt that Eritrea would follow the ordinary practice. Under *Piper*, the trial court was entitled in the exercise of its discretion to conclude that the risk that the process would miscarry was no greater than that in other forums that have been held to be adequate. Similar issues are routinely recognized as being within the trial court's discretion. *E.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2nd Cir. 2002) (the appellate court accepted the trial court's rejection of the charges of Ecuadorian courts' alleged corruption and favoritism; "[w]e cannot say these findings were an abuse of discretion"); *Iragorri v. International Elevator, Inc.*, 203 F.3d 8, 13-14 (1st Cir. 2000) (appellate court accepted the trial court's evaluation that potential personal danger to plaintiff did not make Columbia an inadequate forum; "the district court did not commit an abuse of discretion in assigning diminished weight to the State Department's advisory" against unnecessary travel to Columbia).

It is no answer for Respondents to point out (Opp. 9-10) that the court of appeals in its decision refers to some of the relevant factors. It was the responsibility of the trial court, not the court of appeals, to weigh these factors in the exercise of its discretion. In any event, the court of appeals did not base its decision on any such weighing but solely upon the fact that Eritrea had legal control of the claims. App. 7a, 8a-9a.

3. Respondents err in arguing (Opp. 11-15) that there is no conflict between the decision below and the decisions of other circuits. In an effort to avoid this conflict, Respondents argue that in *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987), the Second Circuit did not expressly rule on the question whether the Indian government's control of the claims of the private parties rendered the Indian forum inadequate. However, the court was well aware of the control of the claims by the government of India, and after a full review (809 F.2d at 198-199) of the district court's exhaustive analysis of the adequacy of the alternative forum (*In re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984,* 634 F.Supp. 842, 845-852 (S.D.N.Y. 1986)), held that the *forum non conveniens* dismissal was clearly warranted – that indeed "it might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal." 809 F.2d at 202. In contrast, the D.C. Circuit disqualified the Claims Commission for a factor – plaintiffs' lack of control of the claims – that was accepted without objection by the Second Circuit.

The Fifth Circuit decision in *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002), is also in conflict with the decision below. In *Gonzalez*, the Fifth Circuit accepted the foreign forum as adequate under *Piper* even though the law applicable there, as the court recognized, would result in

plaintiff having no chance of recovery. 301 F.3d at 382-383. In contrast, the D.C. Circuit here rejected the Eritrea Ethiopia Claims Commission as inadequate because the Respondents' recovery might theoretically be frustrated by Eritrea. A ruling by one court of appeals that a forum cannot be adequate because recovery could be frustrated under some circumstances cannot be reconciled with the decision of another circuit finding that the alternative forum is adequate notwithstanding the fact that it is certain that plaintiff cannot recover there.

4. Contrary to Respondents' assertion (Opp. 16), the decision of the court of appeals does effect a *per se* disqualification of state-to-state arbitral tribunals based on state espousal of private claims. The court of appeals found that the Eritrea Ethiopia Claims Commission was an inadequate forum solely because of the legal character of the espousal procedure, i.e., the espousing state's legal power over the claim. App. 8a-9a. The effect of the decision is to disqualify any state-to-state tribunal where private claims are espoused by the state because the legal principles upon which the court of appeals relied apply to any such tribunal.[3] *See Restatement, supra,* §§ 713 and 902, and § 902, Cmt. i.

Similarly, Respondents err in arguing (Opp. 18-19) that the decision below is a narrow one that has no effect on other tribunals based on state espousal of private claims. Contrary

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[3] It is irrelevant that, as Respondents point out (Opp. 16-17), the court of appeals decision does not apply to claims that the private claimant can pursue in its own right (such as claims in excess of $250,000 before the Iran-United States Claims Tribunal). The court of appeals decision, and the Petitioners' argument here, deal with tribunals that operate on state espousal. Espousal is still the principal means by which private claims are pursued against foreign governments. Pet. 13.

to Respondents' assertion (Opp. 18), the decision below did address "principles of state espousal generally." The basis upon which the court of appeals disqualified the Claims Commission is a basic legal principle of state espousal. Pet. 12-14.

The court of appeals did not, as Respondents argue (Opp. 18), render its decision "in the unique context of Article 5(8) of the Agreement" between Ethiopia and Eritrea (which provides that actions filed prior to the date of the Agreement may be, but are not required to be, brought before the Claims Commission). Indeed, the court of appeals did not even mention Article 5(8) except to note that it did not reach Respondents' argument based upon that provision.[4] App. 6a. The court's rationale for disqualifying the tribunal depends solely upon the legal rights of the state that espouses the private claims. This rationale is entirely independent of whether the tribunal's governing instrument purports to permit or bar claims in other forums.

5. Respondents err in arguing (Opp. 19-21) that the court of appeals decision can have no impact upon the application of *forum non conveniens* if the instrument establishing the arbitral tribunal does not permit claims to be brought in other forums. Of course, Respondents' argument is not applicable if the pertinent agreement is silent on the issue of concurrent jurisdiction, i.e., if it defines the jurisdiction of the tribunal but does not purport to bar claims within its jurisdiction from being prosecuted in other forums. But even where the agreement does contain such a

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[4] Respondents' argument (Opp. 18) that the absence of any discussion of Article 5(8) in the Petition betrays some "flaw" in Petitioners' argument is nonsensical. Article 5(8) was not discussed either in the court of appeals ruling or in the Petition because it is irrelevant both to the decision and to the reasons why that decision should be reviewed on certiorari.

prohibition, it is by no means clear that a U.S. court would give it effect to deprive the court of the power to adjudicate a dispute which by hypothesis is otherwise within its jurisdiction. In such a situation, the party bringing the lawsuit (i.e., the private claimant) would not be a party to the agreement containing the restriction. Moreover, the tribunal whose exclusive jurisdiction the U.S. court would be thus enforcing is a tribunal that falls in the category that the court of appeals here held to be "so clearly inadequate or unsatisfactory that it is no remedy at all." App. 8a.

6. There is no valid basis for Respondents' argument (Opp. 3, 21-22) that the decision below advances U.S. interests because it promotes the policy that Respondents allege to underlie Article 5(8) of the Agreement. Article 5(8) does not in fact have the purpose alleged by Respondents. *See* Supp. App. 3a-4a. But the court of appeals did not reach this issue. App. 6a. Its decision was based solely upon the legal consequences of espousal, and Respondents' theory of the purpose of Article 5(8) is irrelevant here.

7. Respondents err in arguing (Opp. 22) that the court of appeals decision poses no conflict with *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *Abrahim-Youri v. United States*, *supra*. As Petitioners have shown (Pet. 21-23), U.S. nationals can be lawfully required to submit their claims to a state-to-state arbitral tribunal (*Dames & Moore*) and to accept the settlement of the claims so submitted through state espousal (*Abrahim-Youri*). The holding of the decision below that a tribunal is inadequate because it employs the espousal procedure cannot be reconciled with the holding of *Abrahim-Youri* that U.S. nationals can be required to submit their claims to espousal.

Respondents sole attempt to distinguish *Abrahim-Youri* (Opp. 22) is to assert that it does not deal with the "same subject matter." But the subject matter is manifestly the same, i.e., the mandatory submission of private claims to

resolution through state espousal. The fact that the decision below arose in the context of *forum non conveniens* does not remove the patent inconsistency. There is nothing in the *forum non conveniens* doctrine that makes the espousal procedure less appropriate than in other contexts. Not only is the decision below in conflict with *Abrahim-Youri,* it is likewise in conflict with the practice – frequently adopted by the U.S. executive and recognized by the U.S. courts – of requiring private claims against foreign governments to be resolved through espousal. Pet. 23-25.

8. Finally, Respondents fail to rebut Petitioners' argument (Pet. 27-29) that the decision below undermines the role of the doctrine of *forum non conveniens* in permitting U.S. courts to screen out foreign disputes that fall within the letter of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, but are more appropriate for litigation in foreign forums than in U.S. courts. This Court and lower courts have expressly recognized this role for the doctrine of *forum non conveniens.* Pet. 27. Respondents' dictum (Opp. 23) that "[t]he only U.S. policy about hearing claims under the FSIA is reflected in the provisions of the FSIA itself" is contradicted by these decisions. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490, n. 15 (1983); *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 394 (2d Cir. 1985); *see also Piper*, 454 U.S. at 251, n. 17. Respondents' attempt to refute this is to point out that in this case the court below has not reached the question of FSIA jurisdiction. Opp. 23. But this has no bearing whatsoever upon the issue because the court of appeals decision by its rationale rules out *forum non conveniens* referral whether FSIA jurisdiction has been established or has yet to be decided.

CONCLUSION

The decision of the court of appeals does effect a *per se* disqualification of state-to-state arbitral tribunals based on state espousal of private claims, and in this it is in conflict with the decisions of this Court and lower courts and with the established practice of the U.S. government. For the reasons stated herein and in the Petition, the Court should grant certiorari and reverse the decision below.

Respectfully Submitted,

W. DeVier Pierson
Counsel of Record
Knox Bemis
Erica L. Salmon
Piper Rudnick, LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

September 4, 2003

SUPPLEMENTAL APPENDIX

[Excerpts from the Declaration of B. Donovan Picard, dated 28 June 2001. The entire declaration appears at C.A. Joint App. A535-45.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HIWOT NEMARIAM, et al.,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA	:	Civil Action No. 00-CV-01392-TPJ
	:	
and	:	
	:	
THE COMMERCIAL BANK OF ETHIOPIA,	:	
	:	
Defendants.	:	

Declaration of B. Donovan Picard

1. My name is B. Donovan Picard. I am a citizen of the United States and an attorney admitted to practice before the courts of the District of Columbia and the State of Virginia, and before the United States Supreme Court.

2. I make this declaration in support of the Defendants' Motion to Dismiss and in opposition to

Plaintiffs' Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss, both of which were filed in the captioned proceeding (the "Hiwot Nemariam litigation"). I provide in this declaration facts within my personal knowledge regarding the Claims Commission established under the December 12, 2000 Peace Agreement between Ethiopia and Eritrea (the "Peace Agreement").[1]

3. I graduated from the University of Virginia School of Law in 1976 with the degree of Juris Doctor. A substantial portion of my practice has been the representation of companies and governments in matters involving both public and private international law.

4. I was Legal Counsel to the Government of Ethiopia in the negotiations leading to the Peace Agreement, and I am at present Legal Counsel to the Government of Ethiopia in the proceedings before the Claims Commission and the Boundary Commission, both of which were established under the Peace Agreement. As Legal Counsel, I have been active in the representation of the Government of Ethiopia in the proceedings before the Claims Commission.

5. I have read the June 7, 2001 Declaration of Professor Lea Brilmayer and the June 7, 2001 Declaration of O. Thomas Johnson, Jr., both of which were appended to Plaintiffs' Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss filed on June 8, 2001.

[Paragraphs 6-8, omitted here, appear at C.A. Joint App. A536-37.]

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[1] The Peace Agreement is appended as Exhibit 6 to the April 25, 2001 Declaration of Ambassador Fisseha Yimer, which is Appendix A to Defendants' Reply in Support of Motion to Dismiss filed April 30, 2001.

Relation between the Claims Commission and claims filed in another forum.

9. During the negotiations that resulted in the Peace Agreement and the establishment of the Claims Commission, the parties were aware of claims that had been filed in other forums that would be within the proposed jurisdiction of the Claims Commission as defined in the Peace Agreement, including the claims filed in the Hiwot Nemariam litigation and claims filed by the Government of Ethiopia with the Court of Justice of the Common Market of Eastern States of Africa ("COMESA") for $130,000,000 in losses suffered by Ethiopia and its nationals due to the confiscation of property at the ports of Eritrea.

10. The Plaintiffs' June 8, 2001 Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss (p. 18), and the June 7, 2001 Brilmayer Declaration (¶¶8-11) appended thereto are in error in stating that Ethiopia agreed that the establishment of the Claims Commission would "not interfere with" the Hiwot Nemariam litigation. What Ethiopia – and Eritrea – agreed to is set out in the Peace Agreement, Art. 5, ¶ 8, where it is stated that: "Except for claims ... filed in another forum prior to the effective date of this Agreement, the [Claims] Commission shall be the sole forum for adjudicating the claims described...." The effect of this provision is to give the Claims Commission concurrent but not exclusive jurisdiction of claims such as those in the Hiwot Nemariam litigation and in Ethiopia's COMESA action. There is nothing in the Peace Agreement, or in any other agreement between Ethiopia and Eritrea, that suggests that a court in the United States is a more appropriate forum for litigation of the Hiwot Nemariam claims. Nor is there any agreement that the Hiwot Nemariam litigation is to continue as if the Claims Commission did not exist, or any agreement that the Court in the Hiwot Nemariam litigation should not consider whether

the doctrine of *forum non conveniens* applies because the Claims Commission is the more appropriate forum.

11. On March 21, 2001, COMESA granted the motion filed by Ethiopia to stay the proceedings on the $130,000,000 in claims it had filed there so that the claims could be brought before the Claims Commission.

12. As noted above (¶ 8), the claims filed by Eritrea will include those subject to the Hiwot Nemariam litigation. Indeed, Professor Brilmayer's June 7, 2001 Declaration (at ¶¶ 21-23) confirms that Eritrea will include in its claims before the Commission the same claims the plaintiffs are pursuing in the Hiwot Nemariam litigation. For its part, Ethiopia has agreed that the Claims Commission is the appropriate forum for these claims and will itself bring corresponding claims to the Commission for the property losses and other injuries suffered by Ethiopians deported or displaced by the actions of Eritrea. See, May 1, 2001 submission of Ethiopia to the Claims Commission (Exhibit 2 to the Second Declaration of Ambassador Fisseha Yimer), at p. 13.

13. The Claims Commission will necessarily be the forum for consideration of all claims for personal injury and property loss that do not fall within the theory on which plaintiffs predicate their jurisdictional argument in Hiwot Nemariam. The only property that could be subject to adjudication in the Hiwot Nemariam litigation, even if plaintiffs' theory of jurisdiction were correct, is property that is "owned or operated" by the Commercial Bank of Ethiopia within the meaning of 28 U.S.C. § 1605(a)(3). All other property claims of the plaintiffs and all property claims of other deportees must necessarily be presented to the Claims Commission, as there is no jurisdictional basis for such claims to be considered by a United States court. For the same reason, all claims for personal injury of the plaintiffs in

the Hiwot Nemariam litigation and of all other deportees will be presented to the Claims Commission. It would be extremely disruptive of the proceedings of the Claims Commission to have those claims that are the subject of the Hiwot Nemariam litigation – i.e., some of the property claims of some of the deportees – considered separately in a court proceeding.

[Paragraphs 14-22, omitted here, appear at C.A. Joint App. A540-44.]

23. I swear under penalty of perjury that the foregoing statements are true to the best of my own personal knowledge.

/s/ B. Donovan Picard
B. Donovan Picard

Dated this 28th day
Of June, 2001